

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9299

BRIEF FOR APPELLANT

United States Court of Appeals

DISTRICT OF COLUMBIA.

474

HAZEL WEBER,

Appellant

vs.

GERTRUDE EATON

Appellee

**Appeal from the District Court of the United States for
the District of Columbia**

**United States Court of Appeals
for the District of Columbia**

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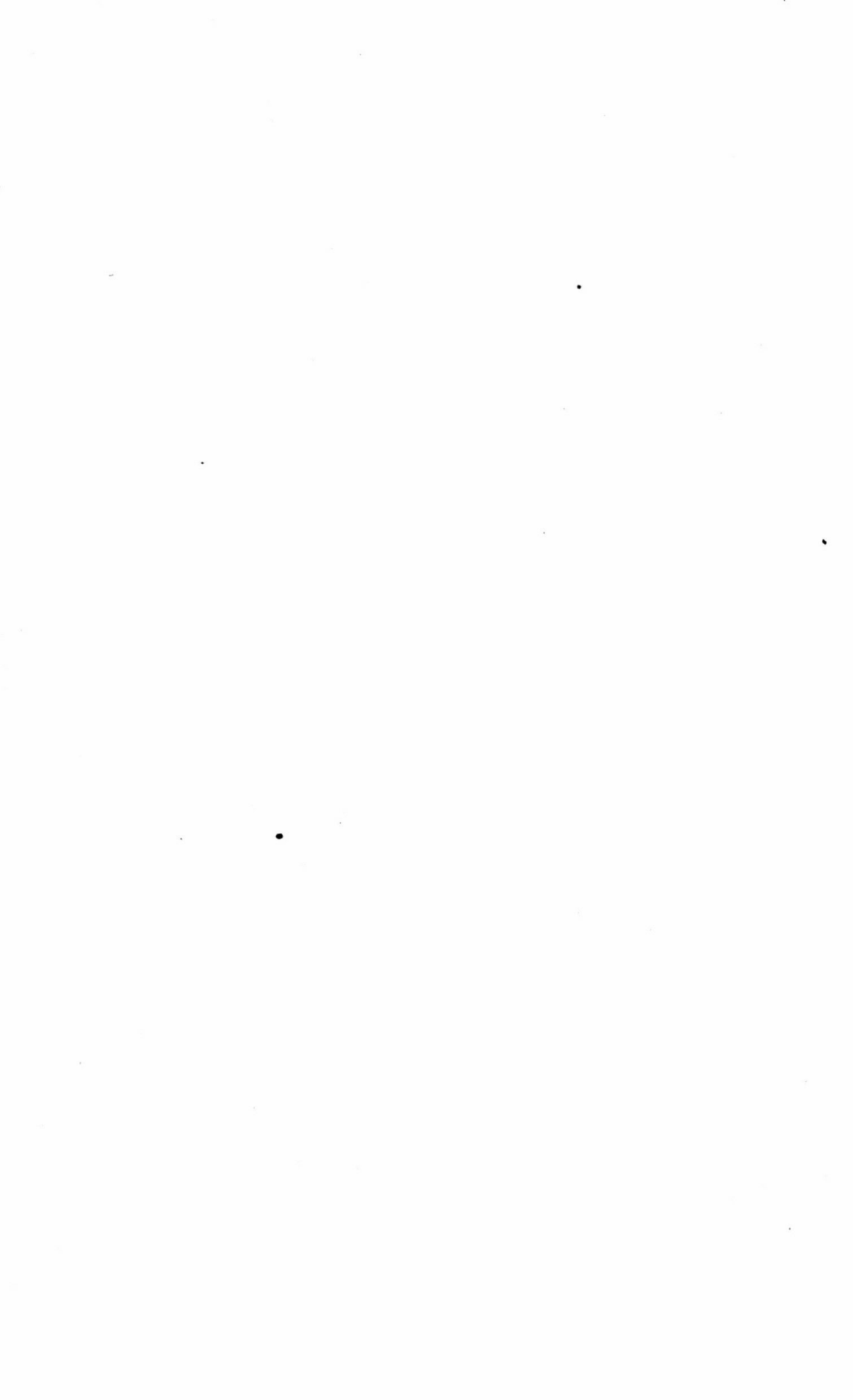
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United States Court of Appeals

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No. 9299

HAZEL WEBER,

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vs.

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Appellee

**Appeal from the District Court of the United States for
the District of Columbia**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the District Court of the United States for the District of Columbia. Appellate jurisdiction is vested in this Court by Act of March 3, 1891, C. 517, Sec. 6 (26 St. 828) and amendments; U. S. C. Title 28, Sec. 225.

Jurisdiction in the District Court of the United States for the District of Columbia was based upon Title II, Sec. 301 of the 1940 Code of Laws for the District of Columbia and Acts of Congress as therein cited.

The suit in the District Court was one for damages for personal injuries sustained by Appellee when an automobile owned by Appellant, and in which Appellee was riding, was in collision with street cars of the Capital Transit Company, on Wisconsin Avenue, in the 1600 block, in the District of Columbia. The defendants in the suit were Appellee and the Capital Transit Company, but the jury returned a verdict in favor of the latter.

STATEMENT OF CASE

Appellee, on February 22nd, 1944, entered the automobile of Appellant at the Westchester Apartments; the automobile was operated by Appellant's husband; the automobile proceeded down Wisconsin Avenue alongside the tracks of the Capital Transit Company, it was raining at the time and the automobile was being driven between the west curb and the car tracks when a southbound street car struck it in the rear and it skidded across the tracks and was then struck by a north bound street car and sandwiched between the two street cars (App. 10 to 12). The automobile was being driven "slowly and carefully" by Appellant's husband (App. 12). The north bound street car was about a block away when the south bound car struck the automobile (App. 13).

After Appellee had testified to the above she called the employees of the Capital Transit Company, who were operating the street cars who testified that the automobile had caught up to the south bound street car, and when it had reached the front end it suddenly cut in on the street car track and skidded sideways down the track, and was caught and sandwiched between the south bound car

and the north bound one, the latter being about 40 or 50 feet away when the automobile passed the former and skidded (App. 46). The Appellant's husband, who testified that he was driving at about 20 to 25 miles an hour, when for some reason the automobile went into a skid, south bound car struck it a light blow and north bound car coming at terrific speed struck and mashed it between two street cars; and that north bound car was a block away after south bound car had struck automobile (App. 40); that he had had nothing to drink and he did not tell the Police Officer that he had had any drinks, although the officer had asked him (App. 43).

Albert B. Nicholson, of the Accident Prevention Unit of the Metropolitan Police Department, who testified on cross-examination by counsel for Capital Transit Company, that Appellant's husband had odor of liquor on his breath when he took him from hospital to scene of accident and when he asked him about that he stated that they had had two cocktails, or drinks, that they had just come from Mrs. Eaton's place; that the Appellee's husband said he might have struck curb, or skidded, then said he did not know how accident happened, and asked witness not to let his wife, who was in Florida, know, and that it was all his fault (App. 35-36).

Appellee and Appellant's husband also testified that they were on the way to the house of Mrs. Mary Gibb, on Reservoir Road, to attend a dinner or buffet supper when the accident happened, having been invited to come there by Mrs. Gibb (App. 41).

The Defendant, Capital Transit Company, called Mrs. Mary Gibb, who testified she did not know the Appellee and to the best of her knowledge had never met her; that she had met and knew Appellant's husband, but that she had not invited him and Appellee to her home on the evening in question, that she was not having a dinner or

supper for guests as she had been sick in bed for several days, and that after the accident had happened Appellant's husband had come to her home and told her of it (App. 51 to 55). And Lawrence A. Hartnett, member of the Metropolitan Police Force, who testified that he saw Appellant's husband at the Police Station after Officer Nicholson brought him in, and that he noticed a slight odor of alcohol on his breath and asked him if he had been drinking, and that he replied that he had been to the apartment of the lady who was in the car with him and had had a couple of drinks there, that they were going to the house of a friend to a party, that he was not sure whether he had made a left-hand turn which put him in front of the street car, did not hit the curb and figured that he had just skidded; that he did not want his wife, who was in Florida, to know about it and, that he did not blame anybody, and as far as he was concerned it was "just one of those things" (App. 55 to 58).

At the conclusion of all of the evidence the Court below granted, over objection, Appellee's instruction Number Four, which reads as follows:

"PLAINTIFF'S INSTRUCTION NO. 4

granted [You are reminded of the fact that the vehicle in which the plaintiff Gertrude M. Eaton was riding at the time of the accident in question was then being operated by the agent of the defendant, Hazel Weber, and you are instructed that the drivers negligence, if any, may not be imputed to the plaintiff and that therefore, you shall find that there was no contributory negligence on the part of the plaintiff."

The Court also refused to grant Appellant's Instructions Nos. Two, Three, Four and Eight, which read as follows:

**"PRAYER NUMBER TWO ON BEHALF OF
DEFENDANT NUMBER ONE**

The jury are instructed that if the plaintiff by her own negligence contributed to the accident of which she complains, then your verdict must be for the defendant even though you should find that this defendant's husband was guilty of negligence."

**"PRAYER NUMBER THREE ON BEHALF OF
DEFENDANT NUMBER ONE**

Contributory negligence is negligence on the part of the person injured, which, combining in some degree with the negligence of another, helps in proximately causing the injury of which the former complains. One who is guilty of contributory negligence may not recover from another for the injury suffered."

**"PRAYER NUMBER FOUR ON BEHALF OF
DEFENDANT NUMBER ONE**

used
The jury are instructed that if you find from the evidence that the plaintiff knew, or should have known, that the driver of this defendant's car was in such condition as to make it probably unsafe for him to operate an automobile and she did thereafter voluntarily become a passenger therein, then she assumed the risk of injury, and your verdict should be for this defendant, if you should further find from the evidence that the condition of the driver herein referred to was a proximate cause of the accident."

**"DEFENDANT, CAPITAL TRANSIT COMPANY'S
REQUESTED INSTRUCTION NUMBER EIGHT**

If you find that in view of the weather condition this was an unavoidable accident, then it is your duty to return a verdict for the defendants."

After the Court refused to grant Appellant's Instruction No. Four, counsel for Appellant requested permission

to argue to the jury that if they found that the Appellant's husband had been drinking, that his condition from drinking contributed to the happening of the accident, that the plaintiff knew of this condition before she entered the automobile and thereafter voluntarily entered, then she assumed the risk attendant upon the operation of the automobile by him, but this request was refused (App. 63).

STATEMENT OF POINTS

1. The Court erred in granting Appellee's Instruction Number Four.
2. The Court erred in refusing to grant Appellant's Instructions Numbers Two, Three, Four and Eight.
3. The Court erred in refusing to permit counsel for Appellant to argue to the jury the conclusion the jury should reach as to the assumption of risk on the part of Appellee if they found that Appellant's husband had been drinking, that his condition from drink contributed to the accident, that Appellee knew of this condition before she entered the automobile and then voluntarily entered.

SUMMARY OF ARGUMENT

1. Appellee's Instruction Number Four directed the jury to find as a matter of law that there was no contributory negligence on the part of Appellee, because the driver's negligence could not be imputed to Appellee. The vice of this instruction lies in the fact that it excludes from the consideration of the jury all acts of negligence of which Appellee herself might have been guilty under the peculiar circumstances of this case, such as failing

to protest against the driver's action in attempting to pass the street car where the space for passage was so narrow and the roadway wet from the rain, which was still falling; and her action in voluntarily entering the automobile when she must have known of the driver's condition, if certain testimony was believed by the jury. The driver was the husband of Appellant, who was in Florida at the time, and her case had to be argued upon the evidence produced by Appellee and the Capital Transit Company. Their presence in her automobile was without her knowledge, and her husband, called as a witness by Appellee, testified in support of Appellee concerning the alleged dinner invitation to the home of a mutual friend who later contradicted their testimony, and denied acquaintance with Appellee. The odor of liquor on the driver's breath hours after the accident, his inability to tell the police officers how the accident happened, his admissions to them, and the Appellee's highly improbable story of the accident did not warrant the granting of this peremptory instruction. For the same reasons the Court was in error in refusing to grant Appellant's Instructions Nos. Two, Three and Four, and in refusing to permit counsel for Appellant to argue to the jury that Appellee must have known of the fact that the driver had been drinking and that she voluntarily assumed the risk of injury because of his condition.

In addition it should be recognized that the denial by the Appellee of the existence of certain facts does not preclude their establishment by circumstances which point to their existence.

2. The Appellee and the driver of the automobile, who was called by her as a witness, testified in such manner as to give rise to a reasonable probability that the accident was an unavoidable one for which no person was to blame. Appellee said that the automobile was being driven "slowly and carefully," and that they had not passed the

south bound street car; that when they were thus proceeding the street car collided with the rear of the automobile. Although she said she did not remember the automobile skidding, the driver, as her witness, testified that the automobile for no apparent reason went into a slow skid and slid on to the street car track. The jury might well have concluded that the accident was the result of weather and roadway conditions without fault on the part of any of the parties, and therefore unavoidable. Under those circumstances it was the duty of the Court to instruct the jury at the request of Appellant that if they found the accident to be unavoidable then their verdict should be in her favor.

ARGUMENT

I.

The Question of Appellee's contributory negligence or her assumption of risk should have been submitted to the jury under the requested instructions.

The transcript in this case shows a situation where a defendant was placed at the mercy of the opposing parties, and was obliged to make the best possible defense on the evidence produced by them. At the time of the accident she is in Florida looking after her mother, and has no knowledge that her husband is using her car for the purpose of entertaining another woman. An accident happens, her husband desires that knowledge of it be kept from her, and it is reasonable to suppose that the story of the invitation to Mrs. Gibb's home for dinner and the request that he call for Appellee and bring her there was told to allay her suspicions. The testimony of Mrs. Gibbs in which she denied the invitation and acquaintance with Appellee, justifies this conclusion. Appellant's husband testifies for Appellee and supports

her story, except that he swore that the automobile went into a slow skid before getting on the street car track. He and she deny that either had anything to drink before the accident and yet another witness, called in her behalf, testified that he detected the odor of alcohol on his breath two or three hours after the accident, and when he asked him about his drinking he admitted that he had two drinks before the accident, and a witness called by the Capital Transit Company, testified in like manner and said that Appellant's husband said he had those drinks at Appellee's apartment. Putting aside the contention that the husband's statements to these witnesses would not be binding upon the Appellee, who had called him as a witness, it must be remembered that Officer Nicholson, Appellee's witness, saw Appellant's husband at the hospital, took him from there to the scene of the accident, to complete his investigation at a time which was two to two and a half hours after the accident happened. The husband had had nothing to drink from the time of the accident until Officer Nicholson took him to the scene and yet the odor of alcohol was noticeable and caused the Officer to inquire as to his drinking. Later, when he was taken to Number Seven Precinct by Officer Nicholson, the odor of alcohol was noticeable to Officer Hartnett and he interrogated him about his drinking. The noticeable odor of alcohol so long after the accident happened, taken together with his inability to tell the Officers whether he had made a left hand turn, or hit the curb, and his statement that "it was just one of those things," might well have led the jury to conclude that he was under the influence of intoxicants. The question of alcohol was injected into the case by the Capital Transit Company, first on cross-examination of Appellee's witnesses and then by direct examination of its own, but surely Appellant was entitled to any benefit that she could find in this development. The Capital Transit Company sought by this

testimony to convince the jury that the automobile got onto its track and came in collision with its street car because of the influence of the alcohol on Appellant's husband which caused him to lose control of the automobile. And all of the circumstances of the case as developed by the testimony gave great probability to this theory.

Should not Appellant have been allowed the benefit of any finding that the jury should make with reference to the part that alcohol imbibed by her husband played in this accident, if Appellee knew of his condition when she voluntarily entered the automobile?

Should Appellant be denied the right to have the question of contributory negligence, or assumption of risk submitted to the jury simply because Appellee and Appellant's husband deny the drinking?

If the jury is permitted, as it was, to consider the testimony of the odor of alcohol on Appellant's husband two and three hours after the accident as bearing on his condition at the time of the accident, should it not be permitted to determine that the Appellee knew, or should have known, his condition when she entered the automobile?

If the jury found that the influence of liquor contributed to this accident, how could it justifiably be denied the right to consider whether the Appellee knew of his condition when she joined him to go to the so-called dinner or supper party of which the supposed hostess denied all knowledge?

The jury could well reason that with the odor of alcohol so noticeable long after the accident, Appellant's husband had consumed much more than the two drinks which he admitted to the Police Officers. And they were likely to so reason because of the other circumstances of the case, such as the inability of Appellant's husband to tell the Police just what happened to cause the automobile

to get on the car track, and the testimony of Mrs. Gibbs in contradiction of his and the Appellee's story of an invitation to dinner or supper at the home of Mrs. Gibbs. The evidence of the odor of alcohol was in the case as a fact from which the jury could infer that the influence of alcohol on Appellant's husband at the time of the accident was such as to be a proximate cause of the accident. If the jury did so infer, could they not, as reasonable men, logically draw the inference that the Appellee knew or should have known of his condition? We submit that they could, and should have been given the opportunity to so do. The Court not only refused to instruct them, as requested, but refused to permit counsel for Appellant to argue to the jury the probability that the Appellee knew that Appellant's husband was under the influence of liquor and assumed the risk of riding with him. It is respectfully urged that the error of the Court in so ruling is too plain to require citation of authorities.

II.

There was substantial evidence to support a finding of unavoidable accident, and the Court should have instructed the jury on this theory.

According to the Appellee's testimony the automobile was being driven slowly and carefully, and according to the testimony of Appellant's husband the automobile suddenly, and for no apparent reason, went into a skid and on the car tracks in front of the approaching south bound street car. From this it might well be concluded that the collision was the result of the weather conditions, and the depressions in the roadway alongside the car tracks (App. 34), without actionable fault on the part of any of the parties involved. Under these circumstances the Appellant was entitled to have the Court give the requested

instruction that if they found that because of the weather conditions the accident was unavoidable their verdict should be in favor of Appellant. If the jury believed the testimony of Appellee and Appellant's husband, the accident was one which fitted the definition of unavoidable accident as given in *Dwyer vs. Chew*, 149 Md. 281, 285, 131 A. 350, 351:—

“An unavoidable accident, as a subject of judicial inquiry, is one which could not have been obviated by the exercise of legally requisite care by any of the persons whose responsibility for the occurrence is asserted or denied. If either the plaintiff or defendant could have averted the accident by proper care, it could not be said to have been unavoidable.”

CONCLUSION

It is respectfully submitted that the trial Court erred in the respects hereinbefore pointed out, that error was prejudicial, and the judgment should be reversed.

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BRIEF FOR APPELLEE

IN THE
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HAZEL WEBER,

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HAZEL WEBER,

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BRIEF FOR APPELLEE.

I.

COUNTER STATEMENT OF THE CASE.

As it appears in the brief of the Appellant, the Appellee was injured on February 22, 1944, while she was riding as a passenger in Appellant's automobile which was involved in a collision with two street cars. Upon the trial of the case the jury returned a verdict against the Appellant.

In addition to the facts set out in the statement of the case contained in the brief of Appellant, the following facts appear in the record. The Appellee was riding down Wis-

consin Avenue in a car driven by Herbert E. Weber, and they had travelled down to Reservoir Road when all of a sudden the accident happened (App. 10, 11). The car was travelling between the street car tracks and the curb, and there was nothing to cause the automobile to change its course (App. 14, 15, 16). The motorman of the southbound street car stated that as the street car passed through the intersection of Thirty-third Street, he noticed an automobile driving along side of the street car. There were no other automobiles driving down the street or parked along the street on that side, and there was plenty of room for the automobile to proceed along the street as it had been driving. The automobile was travelling about 25 miles per hour, and that for some reason unknown to the street car motorman the man driving the automobile suddenly cut to the left onto the street car track, and when the left front wheel struck the track it slid and in a few moments he (the driver) lost complete control of the automobile (App. 24, 25). The street was wet and it was raining. That as the automobile came up near the front of the street car the motorman sounded the gong and stepped on the brake (App. 26, 27). The automobile skidded for about six feet and when it stopped skidding it was headed slightly north, and then the southbound street car and the northbound street car struck it about the same time and sandwiched it between them (App. 26-30). The policeman testified that after the accident Mr. Weber had an odor of liquor on his breath but that he showed no evidence of being under the influence of liquor, and that no record was made either on the hospital record or on the police record of there being even an odor of alcohol on his breath (App. 37, 38). That Mr. Weber was not intoxicated; that he did not stagger; that he appeared to be coherent; and that they could understand everything he said (App. 44). The operator of the northbound street car testified that it appeared to him that the automobile made a left-hand turn in front of the street car (App. 45). Pedestrians on the sidewalk stated

that they saw the automobile and the street car travelling abreast of each other, and the automobile seemed to jump in front of the street car (App. 48, 49). The Appellant and Appellee were friendly before the accident, the families visited each other, but after the accident the Appellant visited the Appellee in the hospital (App. 44).

In the argument on the instructions the Court permitted counsel to argue that if the jury finds this was an unavoidable accident, then they should return a verdict for defendants (App. 62). The Court refused counsel for Appellant permission to argue to the jury that if they (the jury) find that Mr. Weber had been drinking and the drinking affected his ability to drive the automobile safely and his condition from the drinking contributed in any way to the causing of this accident, the plaintiff knew of this condition before she entered the automobile and voluntarily entered the automobile, she assumed the risk of any danger upon entering the automobile (App. 63).

II.

SUMMARY OF ARGUMENT.

1. As the evidence would not have supported a verdict for the Appellant Weber on the issue of contributory negligence, it was proper for the Court to withdraw that issue from the consideration of the jury.

2. To justify a finding that the plaintiff assumed the risk of injury there must be evidence showing notice or knowledge and appreciation of danger, and as no such evidence existed in this case the action of the trial court in denying Appellant's instruction on assumption of risk was proper.

3. Where the evidence shows that the accident could have been avoided by the exercise of reasonable care, an instruction on "unavoidable accident" could only serve to confuse or mislead the jury and should be refused.

III.

ARGUMENT.

1.

As the evidence would not have supported a verdict for the Appellant Weber on the issue of contributory negligence, it was proper for the Court to withdraw that issue from the consideration of the jury.

It is well settled law in this jurisdiction that in the absence of any evidence showing negligence on the part of the plaintiff the jury should not be permitted to indulge in conjecture on the subject, *O'Dwyer vs. Northern Market Co.*, 30 App. D. C. 244, 252 (1908). Contributory negligence is an affirmative defense and must be established by the defendant by the preponderance of the evidence. A mere scintilla of evidence is not sufficient to take a negligence action to the jury, *Tobin vs. Pa. R. R. Co.*, 100 Fed. 2d 345, 69 App. D. C. 262. A review of the record in the instant case fails to show any evidence of negligence on the part of the plaintiff. In fact, not even a mere scintilla of evidence of negligence appears. There is no contention here that the negligence of the operator of defendant's vehicle is imputable to the Appellee, and this Court has repeatedly held that the negligence of an operator of an automobile cannot be imputed to a passenger unless the passenger has some control over the movements of the vehicle. *Burke vs. Anacostia & P. Ry. Co.*, 48 App. D. C. 296, 301 (1919).

In this case the testimony of the Appellee was that she was riding down Wisconsin Avenue, the car was between the curb and the street car tracks, and then the accident happened. The evidence further shows that there was plenty of room for the automobile to proceed along the street as it had been doing without going on the street car track, but when the front of the car was ahead of the street car the automobile driver suddenly cut to the left onto the street car track. The motorman of the southbound street

car testified that he was ringing his gong before the automobile cut in, so that the operator of Appellant's car had or should have had warning of the presence of the street car. The testimony further showed that it was raining, the streets were wet, and that the automobile was going down grade at a speed of about 25 miles per hour. The testimony of another witness was to the effect that the automobile driver seemed to be making a left hand turn. Nowhere does it appear that the plaintiff had or should have had any control over the operation of the vehicle, or did anything or failed to do anything or contributed in any way to its negligent operation.

"The very purpose of instructions is to direct the attention of the jury specifically to the matters relied upon by the parties and to remove the subject of controversy from the domain of vague generality," *District of Columbia vs. Gray*, 1 D. C. App. 500, 506; *Thorwegan vs. King*, 111 U. S. 549; 4 S. Ct. 529.

Appellant's Instruction No. 3 is a proper statement of the law of contributory negligence but it has no application to any of the facts in the present case. A trial court should never instruct a jury on an abstract proposition of law based upon a purely hypothetical case unsupported by testimony. *Moore & Hill, Inc. vs. Breuninger*, 34 App. D. C. 86, 89 (1909).

There is no factual basis or any evidence to support the granting of Appellant's Instruction No. 2. This Court has repeatedly held that an instruction must be applicable to the facts given in evidence. *Washington A. & Mt. V. R. Co. vs. Lukens*, 32 App. D. C. 442, 456 (1909). The law is well settled that it is error to instruct a jury on the state of facts not disclosed by the evidence. In the case of *W. B. Moses & Sons vs. Lockwood*, 54 App. D. C. 115, 117 (1924), the Court held that it is familiar law that an instruction must have some support in the evidence, else it would not be given.

In the case of *Gunning vs. Cooley*, 281 U. S. 90; 50 S. Ct. Rep. 231; 74 L. Ed. 720, this Court held as follows:

“A mere scintilla of evidence is not enough to require submission of an issue to the jury, but in every case, before evidence is referred to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any on which a jury can properly proceed to find a verdict for the party producing it and on whom the onus of proof is imposed.”

The action of the trial court, therefore, in granting Appellee's Instruction No. 4 was proper because it removed from the consideration of the jury an issue upon which it would have to speculate or guess and which was not properly before it.

It is respectfully submitted, therefore, that there was no error in the denial of Appellant's Instructions 2 and 3, and the granting of Appellee's Instruction No. 4.

2.

To justify a finding that the plaintiff assumed the risk of injury there must be evidence showing notice or knowledge and appreciation of danger, and as no such evidence existed in this case the action of the trial court in denying appellant's instruction on assumption of risk was proper.

The principle that one may be barred from recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests. One may with his eyes open undertake to do a thing which he knows is attended by more or less peril, and he may, both in entering upon the undertaking and in carrying it out, use all the care as he is capable of, but whether or not he thereby assumes the risk may depend on other circumstances. Counsel for the Appellee stated his position before the trial court when he asked for permission to argue to the jury that if they found that Mr. Weber had been drinking and the drinking affected his ability to drive the automobile safely, and his condition from the drinking con-

tributed in any way to the causing of this accident and the plaintiff knew of this condition before she entered the automobile and voluntarily entered the automobile, she assumed the risk of any danger upon entering the automobile.

The only legally competent testimony in the case upon which Appellant can base his argument is the testimony that there was an odor of alcohol on the breath of the driver of Appellant's car. The Police Officer testified that while the driver of the automobile had the odor of liquor on his breath, he showed no evidence of intoxication, and that neither the police record nor the hospital record revealed even an odor of liquor on his breath. The officer further testified that the automobile driver didn't stagger; he talked coherently; that he was not intoxicated, but that there was a slight odor of alcohol on his breath. There is no testimony as to when or where the driver of the automobile had been drinking other than a statement alleged to have been made by him to the police officers and denied by the driver of the automobile, which statement, however, is hearsay and inadmissible as far as Appellee is concerned.

It is submitted that in order to have an instruction given to the jury to the effect that a passenger assumed the risk of injury by reason of the intoxication of the operator of the car, there must be some evidence to the effect that the operator not only has been drinking, but that by reason of his drinking there has been an apparent impairment of his faculties. It must further be shown that the intoxication of the driver contributed to the accident, and further, that the passenger knew or should have known of this condition of the driver. There is no showing in the present case of any knowledge on the part of the Appellee of any dangerous or unusual condition. In fact, the testimony is that prior to the time of the accident the operator of Appellant's car appeared to be operating the car carefully. An automobile accident can happen as the result of a second's carelessness or inattention, and the fact that it did happen in this case by reason of the negligence of the operator in cutting to the

left in front of the street car is no ground for assuming that the drinking, if any, of the operator was the cause of the accident.

It is well settled that notice or knowledge and appreciation of danger are indispensable to the assumption of the risk of it; *City of Winona vs. Botzet*, 169 Fed. 321; 94 C. C. A. 563 (1909).

As there was no proof that the driver of Appellant's automobile was under the influence of liquor at the time of the accident, or at any other time for that matter, it would have been error on the part of the trial court to submit that issue to the jury; *R. J. Reynolds Tobacco Co. vs. Newby*, 145 Fed. 2d 768.

In the case of *Drinon vs. Wilson*, 113 Fed. 2d 654, the Court stated:

"The defendant requested the court to charge the jury that if the defendant became drowsy and the accident occurred because he lost control of the car for that reason, and the deceased knew or should have known of his condition and knew such a result was likely to happen and knowing and appreciating the risks and dangers attendant upon her thereafter riding with him she voluntarily continued to do so, she assumed the risk of so doing and could not recover. To the refusal so to charge the defendant excepted. Regardless of whether or not the request was sound in law, its refusal in this case was not error because there was no evidence worth the name that the deceased did have reason to believe that the defendant had become drowsy to such an extent that he would lose control of the automobile and have such accident. It was not error to refuse to charge upon the assumption that the jury would make any findings unwarranted by the evidence."

It is respectfully submitted that by reason of the lack of evidence to support such an instruction, the action of the trial court in refusing to grant Appellant's Instruction No. 4 was proper.

3.

Where the evidence shows that the accident could have been avoided by the exercise of reasonable care, an instruction on "unavoidable accident" could only serve to confuse or mislead the jury and should be refused.

According to the testimony of the street car motorman, the automobile passed the street car and when, while it was only two feet away and partly in front of the street car, it cut into the tracks. There was evidence that there were no parked cars in front of the automobile and nothing which would cause it to turn to the left. The requested instruction was to the effect that if, in view of the weather condition, the jury found the accident to have been unavoidable, then it was their duty to return the verdict for the defendant. The testimony showed that at the time of the accident in question the streets were wet and that it was cloudy at the time. The testimony of the Appellee was that it was raining as they were proceeding down Wisconsin Avenue. To say that an accident is unavoidable by reason of the fact that it is raining, is a new theory of unavoidable accidents. Counsel for defendant were given the liberty to argue and they did argue to the jury on the theory of unavoidable accident. In order for the court to grant the requested instruction the Court would have to disregard the positive testimony and base its instruction on inference and opinion from more remote facts.

It is well settled that instructions given to the jury must be predicated upon the evidence of the case, and that an instruction purely speculative in its character should be refused. As the Court stated in the case of *Pierce vs. Capital Traction Co.*, 42 App. D. C. 493 (1914).

"No evidence has been adduced on this point and no comment thereon had been made by counsel—through this instruction the Court injected a new issue on the case upon which the plaintiff had not been given an opportunity to be heard. This was reversible error."

When an accident occurs which might be prevented by the use of knowledge and proper precaution against the danger, it is not an inevitable or an unavoidable accident. In the instant case the sudden swerving to the left on the part of the driver of Appellant's automobile constituted negligence, and if the automobile driver had used proper care and had continued to drive his vehicle without making a sudden turn, the accident would have been avoidable.

It is submitted that this collision between the Appellant Weber's car and the two street cars certainly could have been avoided by the exercise of due care and, therefore, it was not a proper case to give instruction on an unavoidable accident. By reason of the foregoing it is respectfully submitted that the action of the Court in denying Appellant's Instruction No. 8 was proper.

IV.

CONCLUSION

It is respectfully submitted that there was no evidence of contributory negligence on the part of the Appellee in the present case; that there was no evidence upon which the Court would be justified in granting an instruction on the assumption of the risk doctrine, and that the accident which gave rise to the present case was not an unavoidable accident, but an accident which could have been avoided by the exercise of due care; that the jury's verdict was a fair and proper one, and that there is no reasonable cause to disturb the verdict in the lower court, and that the judgment should be affirmed.

MICHAEL F. KEOGH,
J. ROBERT CAREY,
RICHARD H. LOVE,
709 Woodward Bldg.,
Attorneys for Appellee.

No. 9299

JOINT APPENDIX TO BRIEFS

United States Court of Appeals

DISTRICT OF COLUMBIA

**United States Court of Appeals
for the District of Columbia**

HAZEL WEBER,
Appellant,

FILED OCT 24 1946

VS.

Joseph W. Eaton

CLERK GERTRUDE M. EATON,
Appellee.

**Appeal from the District Court of the United States
for the District of Columbia**

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9299

HAZEL WEBER,
Appellant,

VS.

GERTRUDE M. EATON,
Appellee.

Appeal from the District Court of the United States
for the District of Columbia

JOINT APPENDIX TO BRIEFS

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 24951.

GERTRUDE M. EATON

The Westchester Apartments

Washington, D. C.

Plaintiff.

vs.

HAZEL WEBER

4620 Brandywine St., N. W.
Washington, D. C.

and

CAPITAL TRANSIT COMPANY,
a corporation
36th and M Streets, N. W.
Washington, D. C.

Defendants.

Complaint

(For damages for injuries received in collision)

1. The amount involved in this controversy is in excess of Three Thousand Dollars and within the jurisdiction of

this Court, wherein the plaintiff, Gertrude M. Eaton, is a citizen of the United States and a resident of the District of Columbia, and the defendant, Hazel Weber, is a citizen of the United States and a resident of the District of Columbia, and the defendant, Capital Transit Company, is a corporation operating streetcars in the District of Columbia.

2. On February 22, 1944, the plaintiff was a passenger in an automobile operated by the agent of the defendant, Hazel Weber, and said automobile was travelling south on Wisconsin Avenue in a reckless and careless manner and in violation of the traffic regulations in force and effect
287 in the District of Columbia, at or near the intersection of Wisconsin Avenue and Dent Place, N. W. in the City of Washington, District of Columbia, and a streetcar also travelling south on Wisconsin Avenue struck the automobile in which the plaintiff was riding, knocking it on the north bound streetcar tracks where it was struck by a streetcar north bound on Wisconsin Avenue. At the time and place aforesaid both streetcars were being operated by the said defendant, Capital Transit Company, or its agents, at a fast and excessive rate of speed and in a reckless and careless manner and in violation of the traffic regulations in force and effect in the District of Columbia, and as the result of said collision the plaintiff received serious and permanent injuries.

3. The plaintiff received injuries about her head, body and limbs. She sustained fractures of five ribs on the right side and a fracture of the pelvis. Her neck, back, left leg and right shoulder were badly wrenched and sprained, and same have become and will permanently remain painful, disordered and impaired. Her nervous system was severely shocked and permanently impaired and she suffered and will in the future suffer great physical pain and mental anguish, and she incurred and will in the

future incur large expense for medical, surgical, hospital, x-ray, nursing treatment and medicines, all to plaintiff's damage in the sum of Twenty-Five Thousand (\$25,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of Twenty-Five Thousand (\$25,000.00) Dollars, besides costs of this action.

MICHAEL F. KEOGH
J. ROBERT CAREY
LEO N. MCGUIRE

Attorneys for Plaintiff
709 Woodward Building
Washington, D. C.

288

Demand for Jury Trial

The plaintiff, Gertrude M. Eaton, demands a trial by jury of all the issues involved in the above entitled cause.

MICHAEL F. KEOGH
J. ROBERT CAREY
LEO N. MCGUIRE

Attorneys for Plaintiff

* * * *

289

*Answer of Defendant, Hazel Weber, to
Complaint for Personal Injuries*

Defendant, Hazel Weber, admits the allegations of paragraph one of the complaint. Answering the allegations of paragraph two she admits that the plaintiff was a passenger in her automobile which was then and there being operated

by her agent, admits that the said automobile was struck by a car of the defendant, Capital Transit Company, and knocked into another car of the said Company, and denies all the other allegations of said paragraph two which refer to her and which are not herein specifically admitted. As to the allegations of paragraph three she says that she has no knowledge or information sufficient to form a belief.

HENRY L. QUINN

Attorney for Defendant,

Hazel Weber,
637 Woodward Bldg.,
Washington, D. C.

Service of a copy of the foregoing answer was this 26th day of July, A. D., 1944, mailed, postage prepaid, to Michael F. Keogh, J. Robert Carey, and Leo N. McGuire, Esqs., attorneys for the plaintiff, at 709 Woodward Building, Washington, D. C.

HENRY L. QUINN

Attorney for above Defendants.

* * * *

290 *Answer of Defendant Capital Transit Company*

Now comes the defendant, Capital Transit Company, by its attorneys and for answer to the complaint filed herein says:

1. It admits that it is a corporation and a common carrier of passengers within the District of Columbia and was operating its street cars at the time and place alleged

and that the said street cars were in collision with an automobile owned by the defendant Hazel Weber and operated by her husband Herbert Weber, but it denies each and every other allegation in the complaint contained in so far as pertains to this defendant.

2. For a further defense to the complaint file herein it avers that the injuries, if any, sustained by the plaintiff were caused by the negligent operation of the automobile in which plaintiff was an occupant.

3. For a further defense to the complaint filed herein it avers that the injuries, if any, sustained by the plaintiff were caused by the contributory negligence of the plaintiff.

EDMUND L. JONES

H. W. KELLY

R. E. LEE GOFF

Attorneys for Defendant

Capital Transit Co.

929 E. St. N. W.,

Washington, D. C.

Copy of above answer mailed to opposint counsel this 27th day of July, 1944.

* * * *

315

Civil No. 24951

GERTRUDE M. EATON

Plaintiff.

VS.

HAZEL WEBER

CAPITAL TRANSIT CO.

Defendant.

VERDICT AND JUDGMENT

This cause having come on for hearing on the 6th day of February, 1946, before the Court and a jury of good and lawful persons of this district, to wit:

* * * *

who, after having been duly sworn to well and truly try the issues between Gertrude M. Eaton, plaintiff and Hazel Weber, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 8th day of February, 1946, that they find the issues aforesaid in favor of the plaintiff and that the money payable to her by the defendant Hazel Weber by reason of the premises is the sum of \$8000.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant Hazel Weber the sum of Eight Thousand Dollars together with costs.

CHARLES E. STEWART,

Clerk,

By JAMES M. PARSONS,

Assistant Clerk.

By direction of

JUSTICE T. ALAN GOLDSBOROUGH

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PLAINTIFF'S INSTRUCTION NO. 4

You are reminded of the fact that the vehicle in which the plaintiff Gertrude M. Eaton was riding at the time of the accident in question was then being operated by the agent of the defendant, Hazel Weber, and you are instructed that the drivers negligence, if any, may not be

imputed to the plaintiff and that therefore, you shall find that there was no contributory negligence on the part of the plaintiff.

Granted.

* * * *

301 PRAYER NUMBER TWO ON BEHALF OF DEFENDANT NUMBER ONE

The jury are instructed that if the plaintiff by her own negligence contributed to the accident of which she complains, then your verdict must be for the defendant even though you should find that this defendant's husband was guilty of negligence.

Denied.

* * * *

302 PRAYER NUMBER THREE ON BEHALF OF DEFENDANT NUMBER ONE

Contributory negligence is negligence on the part of the person injured, which, combining in some degree with the negligence of another, helps in proximately causing the injury of which the former complains. One who is guilty of contributing negligence may not recover from another for the injury suffered.

Denied.

* * * *

303 PRAYER NUMBER FOUR ON BEHALF OF DEFENDANT NUMBER ONE

The jury was instructed that if you find from the evidence that the plaintiff knew, or should have known, that the driver of this defendant's car was in such condition as to make it probably unsafe for him to operate an automobile and she did thereafter voluntarily become a passenger therein, then she assumed the risk of injury, and

your verdict should be for this defendant, if you should further find from the evidence that the condition of the driver herein referred to was a proximate cause of the accident.

Denied.

* * * *

308 DEFENDANT CAPITAL TRANSIT COMPANY'S REQUESTED INSTRUCTION NO. 5

If you find that neither of the operators of the two street-cars was guilty of any negligence, then it is your duty to return a verdict for the defendant.

Conceded.

40

Gertrude M. Eaton

the plaintiff, produced as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. KEOGH:

Q. Mrs. Eaton, where did you live on February 22, 1944? A. The same place.

Q. And where was that? A. The Westchester Apartments.

* * * *

Q. Do you know Mr. Herbert Weber, who is the husband of Mrs. Hazel Weber, the defendant or co-defendant in this case? A. Yes, I do.

Q. You had occasion to ride with Mr. Weber on the

night of February 22 in an automobile? A. Yes.

41 Q. Which he was driving? A. Yes.

Q. Will you tell the ladies and gentlemen of the jury, in your own words, what transpired; where Mr. Weber met you, where you went and what developed? A. We went from the Westchester down Wisconsin Avenue about 8 o'clock on February 22, 1944, and it was raining that night; and there was a south-bound street car that struck us.

* * * *

THE WITNESS: A south-bound street car struck the automobile and then there was the car off in the distance, traveling the other tracks, coming north and it struck the automobile, wedging us between the two.

* * * *

Q. Was it dark? A. Yes, it was.

42 Q. And the streets were wet? A. Yes.

Q. And it was raining? A. Yes.

Q. Mrs. Eaton, do you know when you said how far the north-bound car was from you when you first saw it, after you were struck by the south-bound street car? A. I can't say exactly, but it was nearly a block away.

Q. Nearly a block away? A. I am sure about that.

Q. And this north-bound street car which was a block away was traveling on an upgrade?

MR. QUINN: Don't lead the witness.

THE COURT: I sustain the objection. Please don't lead the witness.

THE WITNESS: Coming from down in Georgetown there is a grade pull up Wisconsin Avenue from M Street on up to Massachusetts Avenue and also an up-hill grade there.

BY MR. KEOGH:

Q. And the streetcar which you indicate struck you, how was that traveling, up or downhill grade?

THE COURT: The one that struck her first?

BY MR. KEOGH:

43 Q. Was it going down? A. Going down.

Q. One was going down; the other going up?

A. Right.

Q. The one going up you saw about a block away?

A. Yes.

Q. Did you see the car, the south-bound car, before the accident? A. I did.

* * * *

Q. Did you see the car that was going in a southerly direction? A. No, the one coming north.

Q. The only one you saw was the one coming north?

A. No, I did not see the south-bound car.

Q. Do you recall at what time you became unconscious?

A. The accident happened around 8 o'clock

* * * *

44 BY MR. KEOGH:

Q. Do you remember clearly what happened?

A. The south-bound car struck the automobile.

* * * *

Q. Will you tell us, Mrs. Eaton, as you recall, what happened? A. The north-bound car—

Q. From the beginning?

What do you remember happened when you were traveling in this automobile with Mr. Weber? A. Even before the accident?

Q. No; as you were proceeding south on Wisconsin Avenue. A. We were driving not too fast, driving down Wisconsin Avenue, and we drove past the Calvert movie on Wisconsin Avenue. I read what was playing there that night. We went down to Reservoir Road—then all of a sudden, that is what happened.

* * * *

Q. I would like you to tell what happened as you recall it. A. I believe that is clear—we were just going down,

then being struck by the car.

Q. Do you recall any more than what you have testified to? A. No, I don't.

* * * *

46 Q. What is the next thing you remember, Mrs. Eaton, after the accident? A. I remember getting in a car—entering the hospital, after I was in the receiving ward sitting in the chair, and they were going to take pictures, some x-ray pictures.

* * * *

51

Cross Examination

BY MR. QUINN:

Q. Mrs. Eaton, after you left the Westchester Apartments and started down Wisconsin Avenue, Mr. Weber was driving the automobile very slowly and carefully, wasn't he? A. Yes.

Q. So slowly that notwithstanding it was raining some, you could look out the windows as you passed the different places and read what was going on at the theatre? A. I did.

Q. They did not flash by, you were going so slow A. Yes.

Q. Isn't it a fact that just before this accident happened his automobile skidded? A. That I do not know.

Q. Don't you remember its skidding at all, at any time? A. No.

Q. You said a moment ago, in answer to counsel's question you were hit by a south-bound street car. A. 52 Yes.

Q. Then, there was a north-bound street car which came up there and hit the automobile and telescoped it in between the two street cars. A. Right.

* * * *

Q. After the second street car hit you and you were telescoped between two, you became unconscious. Isn't that correct? A. That is right.

* * * *

Q. When you first saw this north-bound street car it was just before the south-bound car hit you, wasn't that it? A. I did not see the south-bound car.

Q. No, you did not see the south-bound car. A. I just felt that—

Q. You felt the south-bound street car hit you, correct? A. Right.

Q. Just before it hit you you saw this north-bound street car about a city block away? A. Yes, coming up Wisconsin Avenue.

Q. About a block away? A. Yes.

Q. Did you notice the automobile skidding at all after the first car struck? A. No, I did not.

Well, as a matter of fact you do know, Mrs. Eaton, do you not, that the automobile skidded just before it went onto the street car track. A. No, I don't know that.

Q. I show you this four-page statement, which I will ask the reporter to mark for identification "Defendants Weber No. 1."

(The document referred to was marked by the reporter.)

I will ask you now to look at this and see if those are your initials "G. E." on the first page of this statement (handing document referred to to witness). A. Yes, they are.

Q. Your initials "G. E." on the second page? A. Right.

Q. And your initials "G. E." on the third page? 54 I want to check (Witness examining document). That is right.

Q. And on the fourth page, under the words, "I have read the above four-page statement which is true" and your full name is written out, "Gertrude M. Eaton."

That is your signature? A. Yes—but—

MR. KEOGH: Whose handwriting, Mr. Quinn?

THE WITNESS. Mine, the signature.

MR. KEOGH: In whose handwriting is the statement?

I object, Your Honor, to counsel asking anything else about the statement until it has been introduced in evidence.

THE COURT: Overruled.

THE WITNESS: This four-page statement—

THE COURT: She started to make some statement, Mr. Quinn.

THE WITNESS: This is mine (indicating), but this is not my writing.

MR. QUINN: No?

A. (Witness reading) "I have read the above"—

BY MR. QUINN:

Q. (Interposing) I am not asking about that; just your signature. A. Yes.

Q. Your signature comes under those words?
55 A. Yes.

Q. You wrote those initials? A. Yes.

Q. Did you read the statement through before you signed it and put your initials on it? A. No, I did not. I know it was read to me because I was in bed flat on my back.

* * * *

58 Q. Don't you recall when the automobile went in front of the street car—whether it skidded or not—that the south-bound car did not hit the automobile until after the north-bound car had hit it? A. The
59 south-bound street car hit the automobile first.

Q. You say in answer to the question His Honor asked you, you said the automobile was between the curb and the street car track. A. We were riding down the street, after we had ridden many many miles and I don't know exactly how far we were from the curb—just the location—but I know I was between the curb and the tracks.

Q. You never did see the south-bound street car? A. No.

Q. You were conscious of it being there when it came into collision with the automobile? A. Right.

Q. You remained conscious until the second street car had hit and sandwiched you between; don't you remember how the automobile skidded onto the tracks so as to be hit by the street car whether it turned onto the tracks or anything? A. I don't remember. Of course anyone driving, someone could turn the wheels out and I would not know it.

* * * *

Cross Examination

BY MR. HORNING:

Q. Mrs. Weber, you testified a moment ago— A. Mrs. Eaton.

61 Pardon me, Mrs. Eaton, a moment ago you testified you were struck by the south-bound street car; correct? A. Right.

Q. You told His Honor that, didn't you? A. I was struck by two, the south-bound and the north-bound.

Q. Then on cross examination by Mr. Quinn, I understood you to say that you never saw the south-bound street car? A. I did not see it.

Q. How do you know it hit you? A. It must have been the south-bound street car.

Q. You are reasoning that? (Witness hesitates.)

Q. You are concluding a south-bound street must have hit you? A. I did not see anything else around there.

Q. You were paying attention, were you not, as you were going down Wisconsin Avenue? A. Right.

Q. To everything, were you not? A. Tried to.

Q. You saw the north traffic ahead? A. No.

Q. No parked automobiles on Wisconsin Avenue?
62 No.

Q. So there was no reason why your automobile should make any change in its course? A. No.

Q. It was a slippery street? A. I know it was raining that night.

Q. Do you have any recollection of Mr. Weber hitting a curb, some vehicle, as he was going down the street? A. No.

Q. How far had you traveled, you were going south toward Reservoir Road. A. Right.

Q. How many blocks would you say you had traveled down Wisconsin Avenue observing everything? A. Mount Alto is there, there is not much to observe there. Then going down, there are stores, then the movie.

Q. How fast was Mr. Weber driving that night? A. I can't say, but not fast.

Q. In your deposition that Mr. Quinn referred to didn't you say you were going better than 20 or 25 miles per hour? A. No, I don't remember that at all.

Q. You say you were not going very fast? A. Could not have been since I could read the signs.

Q. What is your recollection, not your reasoning? A. My recollection is we were not going fast.

• • • •

64 Q. You intended to go to an address on Reservoir Road, 3419? A. Right.

Q. If you had turned to the right into Reservoir Road and gone in a westerly direction from Wisconsin Avenue, this accident would not have occurred. A. Correct, but may I say something?

THE COURT: Certainly.

THE WITNESS: The reason we passed Reservoir Road, as you go down you make a right-hand turn, if you made that it would be on the parking side of the street.

Entering that way, you would have to make a turn to get on the other side of the street because I believe there is parking on only one side of the street.

* * * *

65 Whose house was this? A. Mrs. Gibb.

Q. You had an engagement to go there? A. Yes.

Q. What time were you supposed to be there? A. Around eight.

Q. What time did this accident happen? A. Ten after eight, I believe.

Q. You were going there for a dinner party? A. Yes, and cards.

* * * *

69 Q. What, if anything, did you observe that caused the automobile to leave the street and get onto the street car tracks? A. I don't know.

Q. Did you see any traffic ahead? A. No.

Q. No parked cars? A. No.

Q. Nothing to cause that change in the course, that you saw? A. No; I don't remember seeing anything.

* * * *

75 Q. Now, proceeding south on Wisconsin Avenue and intending to turn at Reservoir Road, to go to the lady's house, you would have made a right-hand turn, would you not? A. Right.

Q. However, having passed that intersection and going to the south of it in order to get to the roadway,
76 in order to get out on the street car tracks, the driver of the car made a left-hand turn, did he not?

A. No. I don't remember a left-hand turn, because Reservoir Road is to the right of Wisconsin Avenue, right of the tracks.

Q. You were proceeding southerly on Wisconsin Avenue? A. Yes.

Q. Wisconsin Avenue, proceeding north and south, and you were proceeding between the curb and the car tracks?

A. Correct.

Q. The automobile came into collision with the street-car, did it not? A. Yes.

* * * *

77 BY MR. KEOGH:

Q. When you placed your name and initialed this paper, will you tell the ladies and gentlemen of the jury and the Court what your condition was? A. I was in the hospital flat on my back, and this was written up for me.

Q. By this person referred to by Mr. Quinn? A. 78 Yes.

Q. You don't know who it was? A. He had been two or three times to talk to me about it, and this time he wrote this up (indicating) and I being flat on my back said—he said he would read it off to me. He did and I initialed it. Those are my initials.

Q. You were in bed when you signed it? A. Yes, I was.

Q. And weren't you annoyed so much by various representatives of the defendant that you requested the nurse to keep them away from your room? A. Yes; three or four times.

MR. QUINN: I object to that.

THE COURT: The Court thinks it is all right if this is a fact.

THE WITNESS: Yes, three or four times.

Recross Examination

BY MR. QUINN:

Q. Mrs. Eaton, will you read that statement and tell us whether there is anything in it that was not true (handing statement referred to to witness)?

MR. KEOGH: We object, Your Honor, unless Mr. Quinn offers the statement in evidence.

THE COURT: The Court sustains the objection on another ground. The Court thinks Mr. Quinn will
79 have to before asking specific questions and not ask whether or not it is true or untrue.

MR. KEOGH: Who took it, and why; the circumstances and so on.

BY MR. QUINN:

Q. Mrs. Eaton, your name is Gertrude M. Eaton? A. Yes.

Q. And you did reside at the Westchester Apartments?
A. The Westchester Apartments, yes.

Q. 513 building A or 512? A. 512 building A.

Q. In the statement you read and told the man that. A. That is a fact.

Q. You also told him you did volunteer work for the Red Cross; and that was a fact? A. I did not tell him that.

Q. You did not tell him that? A. No.

Q. Is that in the statement? A. I don't know. Let me see it.

Q. (Reading) "I do volunteer work for the American Red Cross." A. I do it, but I did not tell him. I don't know how he knew it.

80 MR. KEOGH: Pardon me.

THE WITNESS: I don't know how he did because I did not tell him.

BY MR. QUINN:

Q. On February 22, 1944, about 8:30 p. m. (reading): "I was injured while riding as a guest in the automobile driven by Mr. Herbert Weber"; that is a fact? A. Yes.

Q. (Continuing reading) "Mr. Weber called for me at the Westchester about 8:15 p. m. It was raining hard at that time and the streets were slippery and wet." That is right? A. Correct.

Q. Does that indicate anything you did not tell him?

A. Well —

Q. Will you indicate as I am reading anything you did not tell him? A. Yes.

Q. (Continuing reading) "I sat in the front seat of the automobile, a Studebaker club sedan. Mr. Weber drove from the apartment in an easterly direction on Massachusetts Avenue and then south on Wisconsin Avenue, northwest.

"We were going to visit the Gibb family on Reservoir Road, Mrs. Mary" —what is the other name? What is the middle name (showing document to the witness)?

A. (Witness examining document referred to) Mary Gibb.

81 (Continuing reading) "Mary Gibb is a friend of Mr. Weber. I had previously made her acquaintance."

Did you tell him all this? A. Yes.

Q. (Continuing reading) "Neither of us had anything to drink"; is that true? A. True.

Q. You told this man that? A. Yes.

Q. (Continuing reading) "I recall that Mr. Weber was driving very slowly and cautiously down Wisconsin Avenue."

Did you tell him that? A. I presume I did.

Q. Is that a fact? A. Not too fast.

Q. (Continuing reading) "We were traveling about 20 miles per hour and driving along the right hand side of road between the street car tracks and the right curb."

A. (Interposing) I don't remember telling him how fast we were going.

Q. Did you tell him you were driving between the street car tracks and the right curb? A. Right.

Q. (Continuing reading) "I recall passing the Calvert Theatre. When we reached a point in front of 1673 Wisconsin Avenue, Northwest, an accident occurred.

82 "I recall our automobile skidded on the wet pavement"— A. I could not have said that about the address, where it happened; I did not know at the time. It was probably some information he looked up and inserted in there.

Q. Do you recall "skidded on the wet pavement"? A. I don't recall we skidded at all.

Q. Did you tell him that? A. No, I did not.

Q. (Reading) "The front end seemed to swerve to the right and the rear end to the left. After the car skidded it was struck almost immediately by a Capital Transit street car headed south on Wisconsin Avenue. A few minutes later a street car headed north on Wisconsin Avenue struck Mr. Weber's automobile."

You don't remember any skid at all? A. No.

Q. You don't remember telling him that the front end seemed to swerve to the right and the rear end to the left; you did not tell him that? A. I don't remember that, because I don't think I had noticed a swerve.

Q. "After the car skidded it was struck almost immediately"; did you tell him that? A. I don't remember that.

83 Q. "A few minutes later a street car headed north on Wisconsin Avenue struck Mr. Weber's automobile"; did you tell him that? A. Yes.

Q. (Continuing reading) "I was quite surprised that this second car should strike Mr. Weber's automobile since it appeared a long distance away when I saw it before the first collision"; did you tell him that? A. Before the first; yes.

Q. (Continuing reading) "I could see the light of the street car as it came up Wisconsin Avenue"; did you tell him that? A. I presume so.

Q. (Continuing reading) "At the time of the collision, I was rendered semi-conscious"; did you tell him that? A. No, I don't think I was semi-conscious, because I don't

remember being removed from the automobile into the ambulance at all.

Q. After the first collision between the north-bound the impact was very slight, wasn't it? A. Yes.

Q. Impact? A. Yes.

Q. You were not rendered unconscious by the south-bound car? A. No.

84 Q. Only when the north-bound car came and rendered you—when you were squeezed between—then you were rendered unconscious? A. Yes.

Q. Did you tell him that? A. I remember people telling me about it after I went into the hospital, about those little things.

Q. Do you recall telling him— A. (Interposing) I remember the rescue squad telling that.

Q. (Reading) "I do recall a trained nurse helping me. "The woman told people she was a nurse and would care for me. I recall someone giving me a capsule of spirits of ammonia which I held to my nose. I was taken to Georgetown University Hospital where I am still confined. Dr. Howard Lee Smith is my attending physician"; is that correct? A. Yes.

Q. (Continuing reading) "I have ridden in an automobile on numerous occasions with Mr. Herbert Weber and always found him to be a careful and competent driver."

You told him that too didn't you? A. Yes; I did.

Q. ((Continuing reading) "On the evening of the accident he was driving slowly and cautiously when the accident occurred."

85 You told him that? A. Yes.

Q. (Continuing reading) "I believe the accident was caused solely by the slippery condition of the road and not by anything Mr. Weber did or failed to do in this driving of the automobile;" did you tell him that? A. Yes.

• • • •

90

Berlfourd Oliver Litton

was called as a witness for and on behalf of the plaintiff herein, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand, and, upon examination, testified as follows:

91

Direct Examination

BY MR. KEOGH:

Q. Mr. Litton, will you state your full name, please?

A. Berlfourd Oliver Litton.

Q. Where are you presently employed? A. With The Pullman Company.

Q. In what type of business is that? A. Operating sleeping cars.

Q. On or about February 22nd, 1944, how were you employed? A. I was operating a streetcar for The Capital Transit.

Q. How long had you been employed as a streetcar operator prior to that time? A. Approximately eight years.

Q. Again directing your attention, Mr. Litton, to the night of February 22nd, do you recall an accident which involved your streetcar, or the streetcar you were operating? A. I do.

Q. And an automobile operated by Mr. Weber? A. I do.

Q. Do you know Mrs. Eaton, the plaintiff in this case? A. I remember her as one of the injured in the automobile.

Q. You had not known her prior to that time? A. No, I had not.

Q. Will you state, Mr. Litton, in your own words,
92 what you observed on this particular occasion?

But let me ask you before you answer that question:

Will you state what direction the car that you were operating was traveling? A. Traveling south on Wisconsin Avenue.

Q. On Wisconsin Avenue? A. Yes, sir.

Q. Will you tell us in your own words just what you observed that transpired? A. Well, I remember it was raining, and my car was pretty nearly loaded with passengers,—

Q. I don't think we can hear you too well over here. A. I say, I had about 40 passengers on my car after leaving "R" Street, proceeding down Wisconsin toward "Q." As I passed through the intersection of 33rd Street I noticed an automobile driving along about midway of my streetcar.

THE COURT: 'Midway your streetcar.' What do you mean by that?

THE WITNESS: That would be about the center doors, or the exit doors.

THE COURT: You mean the car was alongside?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: Now, I had not observed this automobile prior to the time I noticed it about halfway
93 the streetcar. He had not been running ahead of me, and I had not seen him behind me. There weren't any other automobiles there, as far as I remember, driving along the street or parked along the street on that side.

I didn't pay particular attention to him until he had gotten up pretty close to the front end of the streetcar, the right corner of the car. Any time an automobile comes along the right corner of a streetcar the operator usually becomes a bit worried about what is going to happen, whether he will cut in on him, or what will happen. So I was watching him, and certainly not expecting him to cut in, because there was plenty of room for the automobile to proceed along the street as he had been driving, alongside my streetcar.

After he had gotten ahead of me a bit,—He was driving faster than I was. I judge my speed around 15 miles. I would say he was driving around 25. After the front of the automobile, which would be about the length of the motor, had gotten ahead of me, for reason unknown to me the man cut in suddenly to the left on the streetcar track, and when the left front wheel struck the track it slid, and within the next few moments he lost complete control of the automobile. It was in several different positions on the street, finally turning slightly north,—not altogether north, but on an angle.

BY THE COURT:

94 Q. To the left or right? A. To the left, sir.

I had not paid particular attention to a north-bound streetcar until about the time the automobile had turned in a northerly direction.

Q. Had you touched him up to that time? A. No, sir; I had not.

MR. QUINN: I didn't get your Honor's question there.

THE COURT: I asked him if he had touched him up to that time.

THE WITNESS: After he maneuvered in several positions, I was still very close on the automobile. In fact, when he cut over there and began sliding I would say I was not more than two feet from him, and was trying to stop my car; in fact, I had reversed the motors. That particular type of car is what they call the Ten Hundred, which has a manual control upon the dash, to the left of the operator, for the purpose of backing the car up or driving it forward. By reversing the car, or turning the motors backward while in a forward running position it will even oftentimes stop the car much quicker than the brake, and that is what I tried to do, but I was so close on the man there wasn't much I could do about it.

BY MR. KEOGH:

Q. Were both vehicles going in a downgrade? A. Yes, sir.

95 Q. The streets were wet? A. Yes, sir.

Q. And it was raining? A. That is right.

Q. Was there anything to obscure your vision? A. No, sir. My windshield wiper was working properly.

* * * *

96 Q. At any time did the streetcar which you were operating strike the automobile in which Mrs. Eaton was a passenger? A. It did not come in contact with it until my car and the northbound car, I would say simultaneously—

Q. Came together? A. —came together, making a sandwich out of it.

Q. Sort of a double decker sandwich? A. Yes, sir.

* * * *

104 *Berlfourd Oliver Litton*

* * * *

Direct Examination

BY MR. KEOGH:

Q. Mr. Litton, I understand your testimony to be that the street was wet and that it was raining? A. Yes, sir.

Q. And that you observed nothing to cause this automobile operated by Mr. Weber to pull in front of your car? A. Yes, sir.

Q. And that he was midway of the streetcar that you were operating when you first observed him? A. Yes, sir.

Q. And when he reached the corner of your streetcar, the front right corner, you became worried? A. Yes, sir.

Q. Did you do anything up until that time, or had you done anything? A. No, sir.

105 Q. You had not done anything when you observed him midway, apparently passing you, coming down

the hill? A. Well, I couldn't tell at that point whether he intended passing me or not.

Q. But you had done nothing? A. No.

Q. Then I believe you testified he crossed very rapidly in front of you? A. Yes, sir.

Q. Up until that time you had done nothing? A. When he came along near the front of the car I sounded my gong and stepped on the brake.

Q. Did you do that simultaneously? You stepped on the gong, or sounded the gong and stepped on the brake?

A. No, on that particular type of car the gong is operated by foot. It is operated by the heel of the right foot. You can, while operating the brake, use the gong for that matter, but I don't recall whether I did them simultaneously or not. But I do remember I sounded my gong, as was my practice if anything came around close to the front of my car. I usually—

Q. Not what you usually did, what you did as best you recall on this occasion. Do you recall you sounded the gong? A. Yes, sir.

Q. And that you stepped on the brake? A. Yes, 106 sir.

Q. Will you tell the ladies and gentlemen and His Honor where Mr. Weber's automobile was when you first did that? A. Well, I would say he was about halfway the front doors. Now, we have a double door on that car, you know,—

Q. Halfway of the front door? A. Of the double door; in other words, there is a half of that door. He would have been up about even with the front of the first half of the door.

Q. Do I understand you sounded your gong and applied your brake before he pulled in? A. Before he cut in.

Q. What was your reason for sounding the gong and applying your brake before you had any knowledge that he was going to pull in, since you testified you didn't know

whether or not he was going to pull in? A. That is assumed by an experienced operator. If you are operating a streetcar for eight years, and having all sorts of experiences with motorists—

* * * *

A. (Continuing:) Experience will teach an operator when an automobile is near the front end of his car, he doesn't know whether the automobile will turn in front of him, whether he will make a right turn or left turn, or what he will do, for that matter, but he doesn't
107 trust him. It just isn't good—you are not a good operator unless you are careful when an automobile comes around close to the front of your streetcar. You have got to be prepared for whatever might happen. So it was always my practice to warn the man, in the event he did not realize he was near the front end of my car. So I always sounded my gong. I did on that particular night.

BY MR. KEOGH:

Q. You cannot be mistaken but what you definitely observed Mr. Weber, the operator of the automobile, suddenly pull in front of your streetcar? A. Yes, sir.

BY THE COURT:

Q. How far did you say he was ahead of your car at the time he pulled in to the left? A. I would say about two feet, your Honor.

* * * *

Cross Examination

BY MR. QUINN:

Q. Mr. Litton, do I understand that you mean when you said in answer to his Honor's question that he was about two feet ahead of your car when he cut in, that the front of his automobile was about two feet in front of the

front of the streetcar? A. No. By that I meant
 108 the automobile in its entirety was about two feet
 from actual contact with my streetcar when he be-
 gan to cut in on the track.

* * * *

Q. Will you say that over again? A. When the auto-
 mobile actually began to cut in to the left, the motor of his
 car, the length of the motor, was actually ahead of the
 streetcar, that is, the front end of the streetcar, when he
 began to cut in to the left, and in connection with the
 distance from the streetcar to the automobile, I would say
 about two feet. I mean he was actually away from me
 something like that.

* * * *

109 Q. He was coming along here, riding about two
 feet from the side of your car, and when the front of his
 automobile, about as much as the motor part of it—About
 one-third of the machine, isn't it? A. That is right.

Q. —was ahead of your streetcar, then he turned in
 on the track this way? A. Yes, sir.

Q. And you did not hit him at that time? A. I did not.

* * * *

111 Q. When he got to the front of your streetcar
 and started to cut in did he cut in suddenly or grad-
 ually? A. He cut in suddenly.

Q. Did the front part of his automobile cross the tracks?
 A. The left front wheel struck the right track,— That
 would be the track nearest to him, —and that was when
 he began to slide.

Q. Don't you know what caused him to come suddenly
 in there was the fact that he had skidded? A. He had
 not skidded, sir.

Q. You are sure he had not skidded? A. I am quite
 sure.

Q. There wasn't anything ahead of him on the street

in the way of a parked automobile, slightly ahead of the streetcar, that would have caused him to cut in ahead of you? A. No, sir.

Q. No reason why he couldn't keep down the street between the curb and the streetcar track? A. No reason whatsoever.

Q. Whether you were in front, alongside, or back
112 of him? A. That is right.

Q. But suddenly he cuts right in front of your streetcar? A. Yes, sir.

Q. You did not hit his automobile after he started skidding, did you? A. No, sir.

Q. You did not hit his automobile until after it had practically come to a stop from its skidding and the northbound streetcar had hit it? A. Well, sir, I would say when the automobile finally stopped skidding and was headed slightly north,—not entirely north, slightly north,—my streetcar and the northbound streetcar got in pretty much together.

Q. Got what? A. We struck him pretty much together.

Q. Did the northbound streetcar hit it first and swing it slightly before your car hit it? A. I wouldn't say that, sir.

Q. Your car was almost at a standstill, wasn't it, before the northbound car hit it? A. I was moving. It is hard to tell just how fast I was moving. I had the car in emergency and was doing my best to stop it, but it was still moving.

Q. How far did this automobile skid before it
113 came to a stop A. Well, I would say maybe five or six feet.

Q. Five or six feet? A. Yes, sir.

Q. And it started to skid just as soon as the left front wheel hit the west rail of the southbound track? A. Yes, sir.

Q. And when it started to skid that way it went around

in the street like out of control? A. Yes, sir.

Q. And when it ended up it was pointed sort of northwest, was it not? A. Yes, sir.

Q. And that is the position it was when it came to a standstill, and just then the northbound streetcar and your streetcar came in contact with it? A. Yes, sir.

* * * *

120

Albert B. Nicholson

* * * *

Direct Examination

BY MR. KEOGH:

Q. What is your full name, please, sir? A. Albert B. Nicholson.

Q. You are a member of the Metropolitan Police Department? A. Yes, sir.

Q. And you are attached to the Accident Prevention Unit, Mr. Nicholson? A. That is right, sir.

Q. How long have you been attached to that unit?

A. Since it was organized, in 1940.

121 Q. Now, directing your attention to the night of February 22, 1944, did you receive a call to investigate an accident? A. I did.

Q. Which occurred in the 1600-block Wisconsin Avenue? A. Yes, sir.

Q. Where were you when you received that call? A. Somewheres in that immediate vicinity. I mean, we were patrolling that area, No. 7.

Q. After you received the call how much time did it take for you to arrive at the scene? A. I would say between five and ten minutes.

Q. When you arrived at the scene of the accident what did you find? A. We found an automobile had been

sandwiched between two streetcars, and at that time one of the Fire Rescue Squads was taking the people in the automobile, as I later learned, away from the scene. They were leaving just as we pulled up.

Q. What was the weather condition at that time?

A. The streets were wet, and it was cloudy at that time.

Q. Was there any debris or marks on the street? A. From the accident, there was debris and dirt from the car on the street.

Q. Did you take any measurements? A. Yes, sir; we did.

Q. Did those measurements show where the point
122 of the impact was on the street? A. It showed possibly where it was; yes, sir.

Q. Could you tell us where that was? A. It occurred just about south of the south curb of the north side of Reservoir Road. Reservoir Road is split on the west side of Wisconsin Avenue, and it drops down about a hundred feet to go into the east side of Wisconsin Avenue, and it had a curb somewheres about 20 feet south of that south curb of the west side of the Reservoir Road.

* * * *

124 Q. Did you have any conversation with the parties involved in the accident? A. All parties involved in the accident.

Q. Directing your attention to any conversation you had with the operator of the southbound streetcar, what did he say? A. He stated he was coming south on Wisconsin Avenue and that he first noticed the car when it was passing him, that is, from his vision where he could see the car, and that the car had gotten in front of him so he could practically see the whole car and it suddenly swerved right to his left as if it would make a left turn into Reservoir Road, and before he could do anything he had struck the car

BY THE COURT:

Q. Before he could do what? A. Before he could do anything to prevent it he had struck the car. He applied his brake and then he struck the car.

BY MR. KEOGH:

Q. What conversation did you have with the operator of the northbound streetcar? A. He stated he was coming north, on the south side of Reservoir Road, and he saw the two vehicles, the automobile and the streetcar, coming south, and the first indication he had was when this car swerved in front of the other streetcar, and he immediately applied his brakes and air, and he stated he was practically stopped, he was moving but practically stopped at the time of the impact.

* * * *

126

Cross Examination

BY MR. QUINN:

Q. Mr. Nicholson, do I understand, from what you observed there on the street, that the collision took place 20 feet south of the north curb of Reservoir Road, that is, Reservoir Road to the west of Wisconsin? A. I don't know whether I made— The south curb of the north side of Reservoir Road.

Q. Will you come here and just indicate to the jury on this photograph the street about where the accident happened. A. Yes. (Indicating photo:) This street which would run off here is 33rd Street, and Reservoir Road runs out this side, and further up here it runs west; in other words, it takes a hundred feet cut-off there before it drops.

Q. On this picture is that a corner of 33rd and Wisconsin Avenue? A. That is right, sir.

127 Where did the accident happen with reference to that curb there? A. Up in this area here.

Q. Further up? A. Yes, sir. --

Q. So this photograph here doesn't show the exact scene of the accident? A. No, sir; it shows where the streetcars came to rest. This one here, 1673, shows they stopped in front.

Q. Up on the west side of the street, they don't show that? A. No, sir.

Q. Now, I will ask you if it is not a fact that alongside these streetcar tracks here where the macadam and the concrete join, that all along there there are depressions and holes in the concrete there at different places? A. There are small holes there at different places.

* * * *

129 BY MR. HORNING:

Q. Officer, at the time you arrived at the scene of the accident had the parties been removed? A. To the best of my recollection, the ambulance was leaving at that time.

Q. Did you have a conversation with Mr. Weber at the scene of the accident? A. Later. We went back later at the scene of the accident; yes, sir.

Q. What did he say to you and you say to him?

MR. QUINN: I have no objection to it if they propose to contradict Mr. Weber by it. If they promise to connect it up that way I haven't any objection.

MR. HORNING: We will.

A. I took Mr. Weber back as there was something in his statement to clarify what he had told me prior, and we went back and he stated he had struck a curb,
130 he thought.

BY THE COURT:

Q. A curb? A. A curbing that sits there. Then he stated there he struck a curb, and then he said he didn't know what happened. He said first he thought he had struck a curb, then he skidded; then he said he didn't know what happened.

BY MR. HORNING:

Q. Is that all you can recall he said to you? A. Later on we were talking about the accident and he asked me just to forget the whole thing, not even to make a report of it. I told him the parties had been injured and it was necessary for us to make a report, and he said, "Well, it was my fault." He said, "Just forget the whole thing."

Q. Specifically with reference to the motorman, did he make any statement to you? A. He said it wasn't the motorman's fault; it was his fault.

Q. What was Mr. Weber's condition at that time? A. I asked him about that. He stated that they had come from farther up Wisconsin Avenue, I thought from Mrs. Eaton's place, and he said that they either had two cocktails or two drinks, and that they were going to a party. I don't know whether he said dinner party or cocktail party, but I remember it was on Reservoir Road west of Wisconsin Avenue. I think it was the 3400's, because I asked him why he had gone to the left instead of the right, if
131 it were there, and that is when he said he didn't know what happened; because the 3400 block would be to the right of Wisconsin Avenue instead of the left.

Q. I want to be clear on one thing about the point of this accident. This was not at any street intersection, was it? A. It was between the intersections. It is right hard to explain. There is a hundred feet between the south curb of the north side of Reservoir Road and the north side of the south Reservoir Road, if I make myself clear. I have a small diagram here that would show it perfectly.

Q. It was in front of the premises at approximately 1673 Wisconsin Avenue? A. That is right.

Q. And if Mr. Weber had made a left turn at that point there would have been no corresponding street through which he could have proceeded on the east side of Wis-

consin Avenue; isn't that right? A. Where they stopped?

Q. Yes. A. That is right.

* * * *

132 BY MR. QUINN:

Q. Officer, in connection with this conversation you had with Mr. Weber, in which you say you went to the scene and he asked you not to make a report of it. A. Yes

Q. And finally said, "Forget everything;" it was his fault? A. That is right.

Q. In that same connection did he tell you he didn't want any publicity in connection with it? A. That is right.

Q. And he didn't want the word to get to Miami, Florida, where his wife was? A. Yes. He asked me if I would call Florida. I said I had no idea of calling Florida.

Q. He finally told you it was his fault after he told you his wife was in Florida and he didn't want her to know about it? A. I don't remember that sequence, but it was all together.

Q. Did I understand you to say he said he had a couple of cocktails or two drinks? A. He either said two
133 cocktails or two drinks.

Q. How long before the accident? A. Just prior, I would say. That was what I asked him.

Q. Where did he tell you he had the drinks? A. I understood him to say up at Wisconsin Avenue, at Miss Eaton's.

Q. Miss Eaton's apartment? A. Yes, sir.

Q. Did he mention Miss Eaton's apartment in connection with that? A. I wouldn't be sure about that, sir. about her place.

Redirect Examination

BY MR. CAREY:

Q. You didn't charge Mr. Weber with being intoxicated or under the influence of liquor, did you? A. No, sir.

Q. In this conversation you are talking about with Weber, wasn't the conversation at the hospital? A. No, I thought I made that clear. At the finish at the hospital the doctors said they were going to keep Miss Eaton and Mr. Weber could go, so I took him in the car and went up to the scene and talked to him at the scene, and then went on back to No. 7 with him.

Q. This was an emergency case at the hospital, wasn't it? A. That is right.

134 Q. Did you see the report they made at the hospital? A. I don't know whether I saw it, or whether I talked with Mr. Hailey, I think his name was.

Q. You talked with him? A. Yes, sir.

Q. You are familiar with these emergency reports they make at hospitals, aren't you? A. That is right.

Q. It is a standard rule, is it not, when parties to an accident are brought in to a hospital for first aid or emergency, they summon the police? A. That is right.

Q. Isn't it also customary when the parties have the odor of alcohol on their breath to make a notation on the report? A. A.o.t.b.

Q. Can you look at that report and tell me whether you find any notation of that kind? A. No, sir.

THE COURT: Whose report is that?

MR. CAREY: On Mr. Weber and Mrs. Eaton.

THE COURT: Both?

MR. CAREY: Yes.

BY MR. CAREY:

Q. Is there any notation of A.o.t.b. of either of
135 those parties on that report? A. No, sir.

* * * *

137 Q. At the time of the accident he showed no evidence of being under the influence of liquor, did he?
A. Not to a state for a police record; no, sir.

Q. Not to the extent they would make a not of it in the hospital? A. That is right.

* * * *

Recross Examination

BY MR. QUINN:

Q. Did you smell any liquor on Mr. Weber's breath?

A. That is why I asked him. You could smell an odor.

Q. You got the odor of liquor, and then asked him this question? A. That is right.

Q. Did you ask him where he had been before the accident? A. I asked him, and I don't recollect exactly where he said, except he said he had a couple of drinks or cocktails prior to this, and I don't remember where he said he had them. Then I asked him his direction, which way he was coming. There was a question whether he was coming from Reservior Road, and he said he was north on Wisconsin Avenue, coming south.

* * * *

138 Q. Was Officer Hartnett with you when you had the conversation with Mr. Weber? A. No. He was with us after I had the conversation with Weber, at No. 7 precinct. After the accident I went to the hospital and there talked to Mrs. Eaton and Mr. Weber and they told me that they were going to keep Mrs. Eaton, and Mr. Weber could be released. I put him in the scout car and took him back to the scene, and I then took him to No. 7, and Officer Hartnett was there.

Q. Did he repeat any of this information you testified to in front of Officer Hartnett? A. Some of them.

Q. Did Officer Hartnett hear him say anything about having something to drink? A. Yes, sir.

Q. Did he hear him say he didn't want his wife to know about it, she was down in Florida? A. Yes, sir.

* * * *

* * * *

Direct Examination

BY MR. KEOGH:

Q. Will you state your full name, please? A. Herbert E. Weber.

Q. How are you employed? A. I have a branch
145 for the American Optical Company.

Q. You know the plaintiff in this case, Mrs. Eaton? A. I do.

Q. Do you recall being involved in an accident with a streetcar on the night of February 22nd, 1944? A. I do.

Q. Near the intersection of Wisconsin Avenue and Reservoir Road, Northwest? A. Yes, sir.

Q. Whose car were you driving on that occasion, Mr. Weber? A. Mrs. Weber's.

Q. Whose name was it registered in? A. Mrs. Weber.

Q. Will you please tell us, in your own words, what transpired? A. I drove by the Westchester Apartments and Mrs. Eaton got in the car there. She entered the car at the Westchester Apartments, and then we drove on Cathedral—

Q. Where did you first meet Mrs. Eaton on this night? A. At the Westchester Apartments. She was waiting for me as I drove there.

Q. Downstairs at the apartments? A. Yes, sir.

Q. At any time did you go up to her apartment? A. No, sir.

146 You may continue. A. We drove in an easterly direction on Cathedral to the intersection of Massachusetts and Wisconsin, where they all come together; then we drove south on Wisconsin Avenue, and we were going at a rather slow rate of speed.

Q. About how slow? A. Oh, I would say between 20 and 25 miles an hour, until we had passed Reservoir Road, and for some reason or other we went into a very slow skid, when the southbound car struck us. That blow was not a very severe blow, but the northbound car was coming at a terrific rate of speed, and that was the one that mashed us in between the two cars.

Q. How far was the car that you referred to as the north-bound car away when you first saw it after you were struck by the southbound car? A. I saw that car, it was possibly a full block away.

Q. Could you approximate the speed of the car? A. No, I couldn't say that. I know I never expected them to strike us.

* * * *

147 Q. After you met Mrs. Eaton in front of the apartment did you stop any place? A. No, sir.

Q. Between the time you met her and the time of the accident? A. Definitely not.

Q. Will you tell us where you were going on this occasion? A. We were going to visit some friends in the 3400 block on Reservoir Road.

Q. What was the occasion of your picking up Mrs. Eaton? A. Why, going down there—

Q. I mean, was there any reason for your taking her down? Did she have a car? A. Yes, Mrs. Eaton
148 has a car, but it was a very bad night. It was a day very similar to yesterday.

Q. So you offered to drive her down? A. That is right.

* * * *

Cross Examination

BY MR. HORNING:

Q. Mr. Weber, do I understand you to say that you

were going to visit a friend's house? A. Yes.

Q. And that simply as an accommodation to Mrs. Eaton you stopped by the Winchester to pick her up? A. It wasn't exactly an accommodation. It was possibly arranged by friends and all.

Q. Don't you recall what was the fact, instead of 'possibly?' A. Well, that is the fact.

Q. Wasn't it a fact that you were going to visit this friend and you were supposed to take Mrs. Eaton with you? A. That is right.

Q. Were you going there for dinner and bridge? A. Well, it was a little late; possibly more of a buffet dinner.

149 Q. Did you have a specific engagement to go to the friend's house for dinner? A. Not for dinner exactly.

Q. Was it a dinner or buffet? A. I wouldn't know that; I never got there.

Q. Hadn't you been invited? A. Yes.

Q. Was it a party? A. They said to come on down and stop by and bring Mrs. Eaton down.

Q. Who was the friend? Who said to stop by and bring Mrs. Eaton down? A. It happened to be an officer in the United States Army.

Q. What was his name? A. I don't recall the man's name at the present time.

Q. Was it a man or lady? A. There was a man called first, and then a woman called later.

Q. Who was the lady that called? A. Mrs. Gibb.

Q. And you were going to take Mrs. Eaton to Mrs. Gibb's place down there at 3419 Reservoir Road? A. That is right.

Q. For dinner and bridge? A. Well, about the dinner I don't know.

150 Well, bridge? A. Yes, bridge.

Q. You don't know about the dinner? A. No.

Q. But you were invited there that night at the specific invitation of Mrs. Gibb? A. That is right.

* * * *

151 Q. Well, I am asking you, isn't it a fact you overtook the streetcar while your automobile and the streetcar were both in motion? A. No, sir.

Q. Then didn't you make a sudden turn to your left and get on to the streetcar tracks? A. I did not.

Q. You say you went into a slow skid? A. That is right.

152 Q. What caused you to skid? A. I do not know that.

Q. Did you turn the wheel? A. Only when I started skidding I naturally held on to the wheel.

Q. Did you put on your brake? A. I don't know that. I don't believe I did because, just as I say, I think I am a fairly good driver.

Q. What was the condition of your tires? A. Fine.

Q. Do you know of any reason that caused you to come into that skid? A. I do not.

Q. There wasn't any traffic ahead of you? A. No.

Q. There weren't any parked cars on the street? A. I don't believe a car could park in that narrow Wisconsin Avenue.

Q. I am asking you: Were there any cars parked? A. No, sir.

Q. There wasn't anything you can recall that could make that car skid? A. Unless there was something in the street that I struck.

Q. You didn't see anything? A. No, sir.

153 Q. Almost immediately after you started skidding you heard the clanging of the gong of the streetcar, didn't you? A. I did.

Q. Then the streetcar came in contact with you, a matter of very, very few seconds thereafter? A. That is right.

Q. Almost simultaneously, wasn't it? A. I would say almost simultaneously. It was a very, very short space of time.

Q. Then it was a matter of seconds before the northbound streetcar came in contact with you; isn't that correct? A. I would say it was more than seconds.

* * * *

Q. Isn't it a fact that the southbound streetcar pushed you along the street a little way when the collision occurred with the northbound? A. That is right.

Q. And you had only traveled some five or six feet when the northbound streetcar hit you; isn't that right? A. I had traveled that far, been shoved that far, but I don't know whether the car was still in the skid or we were sitting there when this other car came with tremendous force and struck us.

Q. You were still in the skid at that time, were you? A. That is what I said, I don't know whether we had come to a stop or were still skidding, but at that time it was a shove and we were across the track.

Q. When you first saw the northbound streetcar you were actually in that skid? A. That is right.

Q. And at that time the northbound streetcar was fully a block away? A. Yes, sir.

* * * *

156 Q. Didn't you tell him also the whole thing was your fault? A. No, sir.

Q. Didn't you tell him the motorman was not responsible? A. I did not.

Q. Also in that conversation did he ask you whether you had had anything to drink? A. The officer asked me that; yes, sir.

157 Q. You had had something to drink, had you not? A. I did not have; no, sir.

Q. Didn't you tell him you had a couple of drinks or

cocktails just before coming down Wisconsin Avenue?
A. Definitely not.

Q. And that was not the fact? A. I never told him that.

Q. You did not tell him that? A. Definitely did not.

Q. Didn't you tell him you had a couple of drinks or cocktails somewhere up in the vicinity of Massachusetts and Reservoir Road? A. I did not.

* * * *

166

Recross Examination

BY MR. QUINN:

Q. Mr. Weber, when you answered Mr. Keogh's question about being friendly, were you referring to your wife and Mrs. Eaton? A. That is right.

Q. They were friendly before the accident, were they not? A. Yes, sir.

Q. And the families visited? A. Yes, sir.

Q. But since the accident there has been no visitation between Mrs. Eaton and Mrs. Weber? A. No, sir. Well, she did visit her at the hospital.

Q. That was right after the accident? A. Yes.

Q. When she came back from Florida and visited her at the hospital? A. Yes, sir.

Q. But since that time there has been no visitation?
167 A. Not to my knowledge.

* * * *

Harry Boyd Thompson

* * * *

Direct Examination

BY MR. KEOGH:

Q. Will you state your full name, please? A. Harry

Boyd Thompson.

Q. And you are employed as a motorman by the Capital Transit Company? A. Yes, sir.

Q. You were so employed on February 22, 1944? A. Right.

Q. Do you recall an accident which occurred between the car you operated and the automobile operated
168 by Mr. Weber, whom you saw in the witness room?
A. Yes, sir.

* * * *

Q. Will you indicate in what direction the streetcar you were operating was traveling? A. Which direction?

Q. Yes. A. Going North on Wisconsin Avenue.

* * * *

Q. Did there come a time when the streetcar you were operating struck the automobile operated by Mr. Weber?
A. Yes.

Q. How far were you from the automobile when you first saw it, before you struck it? A. When I first saw it I was about 40 or 50 feet, I guess.

Q. 40 or 50 feet. Were you traveling on a down-
169 grade or upgrade? A. Upgrade.

* * * *

Q. Could you approximate the speed you were traveling when you saw this automobile 40 or 50 feet away? A. About 18 to 20 miles an hour.

* * * *

Q. What was the position, the status, of this automobile when you saw it 40 or 50 feet away? A. It started to pass the southbound car, streetcar; right even with the southbound streetcar, the front end of it.

Q. Then what did you see? A. This automobile, just about the time it started to pass the streetcar, it turned, a left hand turn in front of him and in front of me.

170 Q. Then what did you do, if anything? A. I started stopping as quick as I could.

Q. What did you do by way of stopping? A. Pushed the brake and emergency all the way down.

Q. How far away from you was it when you first saw the automobile in front of the southbound streetcar? A. In front of the southbound streetcar? I guess about— How far was I away?

Q. Yes. A. 25 feet, I guess.

Q. Then what did you do? A. Stopped as soon as the car would stop, and hit the automobile.

Q. So you traveled 25 feet before you stopped; right? A. I probably traveled more than that. I probably traveled 30 to 35 feet.

* * * *

171 Q. Which car struck the automobile first? A. Couldn't tell; looked to me about the same time.

* * * *

172 Q. Did you hit him with considerable force? A. Well, I wasn't going fast at the time I hit him. The car was almost stopped at that time. The streetcar has a lot of force even if you are running slow.

Q. Can you tell us what caused the streetcar to leave the tracks? A. The automobile between the two cars. It had to go somewhere.

* * * *

175 *Henry Boyd Thompson*

* * * *

180 *Cross-Examination*

BY MR. QUINN:

Q. Mr. Thompson, when you first saw this automobile

at the front of the street car and before it turned in, how far was your street car away? A. About forty or fifty feet.

Q. That was before the automobile turned in front of the south-bound street car? A. Yes, the first time I seen it.

Q. You were going then about eighteen or twenty miles an hour? A. Yes, sir.

Q. Would you estimate that the south-bound car was going about the same rate of speed? A. I didn't pay particular attention. Probably it was not going any faster; probably not as fast.

Q. Would you say a little faster? A. I would say a little faster.

* * * *

181 Q. Let us forget then, the first question I asked you about its being in front of the street car—how far was your street car away when the automobile cut in on the tracks? A. Not very much.

Q. Away from the south-bound street car? A. I have no way of telling, probably about fifty or sixty feet.

Q. About fifty or sixty feet? A. Yes.

Q. Did that automobile go into a skid right away? A. After it passed the street car and hit the tracks it went into a skid, in front of that south-bound street car—probably fifteen or twenty feet.

Q. You were coming up-grade? A. Yes.

Q. As soon as you saw the car go into a skid, did you put on your brakes? A. Yes.

* * * *

187 MR. HORNING (reading): Direct interrogatories.

Q. What is your full name? A. Carl Erhard Goering.

Q. What is your present occupation? A. Soldier.

Q. Where are you now located? A. European Thea-

tre of Operations, U. S. Army.

Q. Directing your attention to the night of February 22, 1944, did you witness an accident between two Capital Transit street cars and an automobile on Wisconsin Avenue near Reservoir Road in Washington, D. C.? A. Yes.

Q. What were the weather conditions prevailing that night? A. It was raining.

188 Q. What was the condition of the streets that night? A. They were wet from the rain.

* * * *

Q. Did you observe the automobile involved in the accident prior to the collision? A. Yes.

Q. In what direction was it traveling? A. South.

Q. How fast was it traveling? A. See photostatic letter.

MR. BOYD: I think if you will just exhibit the letter to the jury, they will get the general set-up of it and that will serve them.

MR. HORNING: This photostatic copy of letter is dated March 15, 1944, and is signed Carl E. Goering, and his serial number is 39675422, and by Paul Opperer, 189 whose serial number appears to be 32181479 and it reads as follows:

We, Carl Goering and Paul Opperer witnessed an accident which took place in Washington, D. C., on February 22nd, 1944, at about 9 p. m. (We do not recall the exact time.) The accident involved an automobile and two street cars.

It was raining. We were walking south on Wisconsin Avenue on the right-hand side of the street approaching the corner (northwest corner) of Reservoir Road, N. W., when we noticed an automobile and a street car passing us, going south, abreast of each other, at the approximate speed of twenty to twenty-five miles per hour.

Sketch on back of the paper shows our position when accident occurred, and position of accident. The automo-

bile seemed to skid, or hit the curb; in any case it seemed to jump in front of the south-bound street car, clearing it completely, and heading north.

At that moment it appeared, and sandwiched the automobile between it and the south-bound street car, and automobile and street cars stopped.

* * * *

199 MR. HORNING (reading): These are the direct interrogatories propounded to the Soldier Paul Opperer:

1. What is your full name? A. Paul Opperer.
2. What is your present occupation? A. Soldier.
3. Where are you now located? A. European Theatre of Operations, U. S. Army.
4. Directing your attention to the night of February 22, 1944, did you witness an accident between two Capital Transit street cars and an automobile on Wisconsin Avenue near Reservoir Road in Washington, D. C.? A. Yes.
5. What were weather conditions prevailing that night? A. It was raining lightly.
6. What was the condition of the streets that night? A. Wet and slippery from the rain.
- 200 7. Where with respect to the intersection of Reservoir Road and Wisconsin Avenue did the collision take place? A. A little south of the intersection as shown in the diagram (photostat).
8. Where were you at the time of the collision? A. At the northwest corner of Wisconsin Avenue and Reservoir Road as shown in the diagram (photostat).
9. Did you observe the automobile involved in the accident prior to the collision? A. Yes.
10. In what direction was it traveling? A. South.
11. How fast was it traveling? A. About twenty to twenty-five miles per hour.
12. In what direction or directions were the street cars going? A. The one I observed was going south. I only

noticed the south-bound street car at the very moment of the accident.

13. How fast were the street cars going, if you know?

* * * *

201 13. How fast were the street cars going, if you know? A. The south-bound street car about twenty-five miles per hour. I don't know about the north-bound street car.

14. Where with respect to the street car was the automobile when you first observed it? A. Alongside the north-bound street going in the same direction.

15. What, if anything, unusual happened to the automobile while you were observing? A. The automobile apparently tried to pass the street car. It seemed to hit the curb while being abreast with the street car and then turn or skid in front of the street car.

16. What part of which street car struck what part of the automobile? A. The south-bound street car
202 seemed to push the automobile with its front on the side of the automobile, at the same turning or pushing the automobile so that it faced north. After that, the north-bound street car was in my line of sight.

17. In what position was the automobile lodged immediately after the collision? A. Between the two street cars.

* * * *

19. Please give to the best of your knowledge a full account of the accident as witnessed by you, enumerating any details which have not been covered above. A. In connection of the photostatic copy of my and Paul Goering's statements I want to say that the automobile did not travel on the street car tracks or travel in a north-bound direction. The south-bound street car pushed the automobile,

after it had gotten in front of the street car, along, and in so doing turned or pushed the automobile so that it was facing north. The impact between south-bound street car and the automobile happened at the moment the automobile skidded or jumped in front of the south-bound street car and it never got clear of the street car itself.

* * * *

208

Mrs. Mary Gibb

* * * *

Direct Examination

BY. MR. HORNING:

Q. Your full name is? A. Mary Gibb.

Q. How do you spell the last name? A. G-i-b-b.

Q. And you reside at 3419 Reservoir Road? A. Yes.

Q. Did you reside there on February 22, 1944?

209 A. Yes.

Q. Two years ago, this was George Washington's Birthday? A. Yes.

Q. Did you know a Mrs. Gertrude M. Eaton? A. No, I don't.

Q. At that time, did you know her? A. No, I did not.

Q. This is Mrs. Eaton, sitting here (indicating); do you know that lady? A. No, I don't.

Q. Do you know whether you ever met her? A. Not that I know of.

Q. Directing your attention again to February 22, 1944, specifically, had you telephoned her to come to your house for dinner or bridge or for any matter?

* * * *

210

THE WITNESS: No, I didn't.

BY MR. HORNING:

Q. On that evening, were you having any guests at your house for entertainment of any sort, whether dinner, bridge, or buffet supper? A. No.

Q. What was the condition of your house on that evening? A. I was ill in bed.

* * * *

BY MR. HORNING:

Q. How long had you been ill in bed, Mrs. Gibb?
211 A. I don't remember; maybe two or three days.

Q. So you were not having any guests in as a result of a special invitation that night? A. No.

Q. On that day, had you known Mr. Weber? A. Yes.

Q. Had you specifically invited Mr. Weber to come to your house on that day? A. No, I had not.

Q. On that day, did you see him at all? A. No, I didn't.

THE COURT: Did you talk to him over the telephone that day?

THE WITNESS: No, I didn't.

BY MR. HORNING:

Q. Later in the evening of that day, did you see Mr. Weber? A. Yes.

Q. Did you have a conversation with him? A. No, he came in after the accident.

Q. Had you expected him? A. No.

Q. Had you invited him? A. No.

Q. To come? A. No.

212 Q. And specifically to bring Mrs. Eaton A. No.

* * * *

Cross-Examination

BY MR. KEOGH:

Q. Mrs. Gibb, are you married? A. Yes, I am.

Q. Do you live with your husband? A. No, I don't.

* * * *

Q. Do you have any interest in the outcome of this case?

A. No.

Q. Do you know Mr. Herbert Weber? A. Yes.

Q. You are friendly with him, aren't you? A. Yes.

Q. He has been in your house frequently, hasn't he?

A. Mr. Weber hasn't been in my home except twice.

* * * *

213 Q. How do you fix the date—do you recall the specific date of this accident referred to and asked you about by Counsel? A. Yes.

Q. How do you fix it? A. As Mr. Weber came to my home after the accident.

* * * *

Q. Directly after the accident? A. No, I imagine around 11 o'clock.

Q. What day? A. I don't know the day.

* * * *

214 Q. Do you recall testifying that you did not invite Mr. Weber or suggested to Mr. Weber he come to your house that evening to join in a bridge party and to bring a friend? A. No, I wasn't having any party.

Q. Do you recall Mr. Weber telling you he was going to bring a friend, who was Mrs. Eaton, to the party. A. No.

* * * *

215 You do not know any Army officer? A. No.

Q. Who is also known to Mr. Weber? A. I know a Naval officer.

Q. What is his name? A. Commander Goering.

Q. Who? A. Commander Goering.

Q. Comamnder Goering? A. Yes.

Q. Isn't Commander Goering stationed or employed here in the Navy Department? A. No, he is in San Francisco.

Q. He was in Washington, was he not? A. Yes.

Q. Can you give me the name or tell me how we could communicate with Commander Goering? A. I haven't any idea. I know he is in San Francisco, but I don't know his address.

Q. You are very friendly with him? A. He is a very good friend of mine.

Q. And he visited you very frequently? A. Yes.

Q. He was out of the service for a while, wasn't he?

A. Not that I know of.

216 Q. Do you know, Mrs. Gibb, whether or not Commander Goering had communicated with Mr. Weber about visiting your house on the night of February 22, which was a holiday? A. I did not know that.

Q. You did not know that? A. No.

Q. Well, do you know whether Commander Goering talked to you about that night, about dropping in for some bridge or cards? A. No.

Q. Commander Goering was available, that is to say, he was in the city on the night of February 22, 1944? A. Yes.

Q. You knew Commander Goering and Mr. Weber were friends, did you not? A. Yes.

* * * *

219 Q. During the two years that you lived at the Westchester Apartments did you have occasion to meet Mrs. Eaton, who maintained an apartment at the Westchester? A. Not that I remember.

Q. Did you ever meet Mrs. Eaton? A. No.

* * * *

Q. Did you ever attend any gatherings with Mr. Weber
220 at the Westchester or with Mrs. Weber? A. I was
at dinner at their apartment.

* * * *

Q. And quite friendly for quite a long period of time?
A. Yes.

Q. And during those who visited Mr. and Mrs. Weber,
didn't you have occasion to be introduced to Mrs. Eaton,
who lived on the next floor from the Webers? A. Could
be, but I don't remember.

* * * *

Cross Examination

BY MR. QUINN:

Q. Do I understand you recall this date that Mr. Weber
came to your house as the same night as the accident? A.
Yes.

Q. Did he tell you the accident had occurred shortly be-
fore he reached there? A. Yes.

Q. Was he alone when he came to your house? A.
Yes, sir.

Q. You were in bed at the time; was anybody with you?
A. I was in bed.

Q. Did he tell you the reason he came there? A.
221 Yes, he said he had had an automobile accident.

* * * *

228 *Lawrence A. Harnett*

* * * *

Direct Examination

BY MR. BOYD:

Q. What is your full name, Officer? A. Lawrence A.
Hartnett.

Q. And you are a member of the Metropolitan Police of the District of Columbia? A. Yes, sir.

Q. How long have you been so employed? A. Ten years.

229 Q. Directing your attention to, specifically, the night of February 22, 1944, had you occasion to investigate an accident which occurred in the vicinity of Reservoir Road and Wisconsin Avenue? A. Yes, sir.

Q. In connection with that accident, did you have a conversation with Mr. Weber, the driver of the car involved? A. Yes, sir.

Q. Did you talk to him at the scene of the accident? A. No.

Q. Will you tell what was said to you and what he said to you, Officer? A. I first saw Mr. Weber in No. 7 Station House. He was talking to two soldiers. That was the first time I saw him. I think Officer Nicholson brought him in.

I asked him if he could tell me how the accident happened. He said he was driving down Wisconsin Avenue and passed a street car which was going in the same direction he was going. After he got in front of the street car, he guessed he skidded and the next thing he knew he was in between two street cars.

I asked him whether or not he had been drinking because I noticed a slight odor of alcohol on his breath. He said, to the best of my recollection, he said he had been to an apartment with a lady who was in the car with him, and had a couple of drinks there.

230 Then he was asked where they were going. He said they were going to a party. I don't recall what kind of a party, whether dinner or cocktail, but they were going to some party at some friend's house in Georgetown.

Then during the course of the conversation I had a discussion with him as to how his car came to get in front

of the street car. He said he definitely remembered passing the street car and then we discussed whether or not he tried to make a left-hand turn. He said, well, he was not sure whether he made a left-hand turn or not.

Then one of the soldiers had stated he saw him make—saw the man's car sort of jump and thought it had hit the curb.

Then I asked him whether he recalled hitting the curb and he said he didn't think he had hit the curb. His final say was he figured he just skidded so he asked us if we could not "Just forget" about the whole thing. He said he did not want the newspapers to get hold of it, didn't want his name in the paper. He said if it was all right with them, we need not even make a report of it.

MR. HORNING: He said what?

THE WITNESS: He did not want his name in the paper. He said if it was all right with us, we need not make a report of it. He said he did not blame it on anybody; as far as he knew, it was "Just one of those things."

* * * *

231

Cross Examination

BY MR. QUINN:

Q. He said he didn't want any publicity? A. He said he didn't want the newspapers to get hold of it.

Q. Did he say whether or not his wife was in town? A. His wife was supposed to be in Florida.

Q. Did he tell you that? A. Well, during the course of the discussion, it came up about notifying his wife and he said—I believe he said, "Don't call my wife in Florida."

* * * *

Q. He had been over to the hospital and released at that time? A. Yes, sir.

Q. And then had talked to the station house after going to the scene with Officer Nicholson? A. I don't know how he came back. He had been to the hospital but came
232 from the hospital to the precinct.

Q. Are you sure he told you he had had something to drink at the apartment of the lady who was in the car with him? A. That is the best of my recollection.

Q. Did he tell you where her apartment was? A. The Westchester Apartments.

* * * *

233 Q. How many accidents did you investigate that day A. I couldn't tell you.

Q. Do you know the names of any parties in any accident you investigated that day? A. No, sir.

Q. Can you repeat word for word any conversation with anybody involved in any accident other than your conversation with Mr. Weber? A. I don't know whether I investigated any other that day.

* * * *

236 Q. Did you say Mr. Weber was intoxicated or would you say he was intoxicated? A. No, sir.

Q. Did he stagger? A. I don't think he did.

Q. Did he talk very thick? A. I could understand everything he said.

Q. Was he coherent? A. He appeared to be.

* * * *

240 Q. So the only thing you could tell us now is this conversation you had with Mr. Weber? A. That was the most I had to do with the accident, so that is the most I remember about it.

* * * *

248 THE COURT: Gentlemen, let's see if we can have some method about this investigation. Do either defendant concede any of the plaintiff's prayers?

MR. QUINN: I think I concede all of plaintiff's
 249 instructions except No. 4. My reason for that, of
 course, my objection to No. 4 is that the prayer asks
 the Court to instruct the jury that because, under the law,
 the negligence of the driver of an automobile can't be im-
 puted to a passenger; therefore the jury must find there
 is no contributory negligence. That is not the law. It
 would still be contributory negligence; it is not a question
 of the imputation of negligence of the driver, but what
 the driver did or failed to do.

THE COURT: You concede all the prayers except the
 fourth?

MR. QUINN: Except the fourth.

254 THE COURT: Yes. The Court grants Prayer
 No. 1 as amended. It was conceded as amended,
 gentlemen.

MR. BOYD: I have no objection to it, Your Honor, as
 amended.

THE COURT: Conceded as amended.

The Court does not take the view, gentlemen, that there
 was any evidence of any negligence on the part of the
 plaintiff. The Court does not think there is any evidence
 that Mr. Weber was under the influence of liquor.

255 MR. QUINN: You were referring to the—

THE COURT: Prayer of the plaintiff, the
 fourth—

MR. QUINN: The fourth prayer?

THE COURT: The Court thinks the fourth prayer
 should be granted; the fifth prayer granted as amended.

MR. CAREY: We may have exceptions?

THE COURT: Yes.

Now, gentlemen, so far as the Prayers for the defendant No. 1 are concerned, they are based on the theory that there is some evidence in the case that the plaintiff was guilty of negligence. The Court does not think there is. The Court will hear you however, if you desire.

MR. QUINN: We are in this position, if the Court please: We have no witnesses, at least the other two parties here have produced all the witnesses and the Capital Transit Company has brought into the case the fact, through the policeman—the police officer's testimony—that there was drinking; that drinking took place a short time before at Mrs. Eaton's apartment. That was permitted into the case, and it is going to have its effect, and what are
256 we entitled to do in that situation? If the jury should reach the conclusion that this automobile was going on this track due to the fact he had just had two or several drinks at her apartment, on this wet night, then certainly she knew of the risk in riding in the automobile with him. She was there or served him drinks.

THE COURT: We have a settled rule in our family that nobody takes anything to drink if he is going to drive an automobile, but I don't know of anything which says if a person has two drinks that he is guilty of negligence.

MR. QUINN: But when you take the policeman's testimony concerning this, his conversation with Weber and his haziness as to whether or not he started to make a left turn and didn't know whether he had hit the curb, and that is correct, I submit, if the Jury believes that, they will probably say the accident was due to the condition of the driver's drinking. The policeman testified he noticed liquor on his breath sometime after the accident and was simply treated for a cut on his hand.

• • • • •

257 THE COURT: Yes, I agree with all that. You may be right. I may be wrong about this fourth prayer of plaintiff's, but the officer testified the only thing he noticed about him would be a faint odor of alcohol on his breath, and not as to anything in his manner which indicated he had been drinking.

MR. QUINN: When he noticed that odor of alcohol on his breath it was sometime after the accident happened. He had been in the same hospital where Mrs. Eaton was and he had received treatment for his hand; then the officer took him to the scene of the accident, back to the scene, then over to No. 7 Precinct. Of course the odor would become less and less and the jury might well assume that at the time of the accident, the time the accident actually happened, which was in the neighborhood of 8 or 8:30, he was considerably influenced by liquor. If Your Honor does not grant it on the theory of contributory negligence, on the matter of assumption of risk, which I submit we are entitled to—

* * * *

260 THE COURT: Just wait a minute. As far as the plaintiff is concerned, isn't that hearsay testimony? Of course it would be evidence against Weber if he were a defendant. There is no question about that, but is the statement that Weber made, to some third party, evidence against the plaintiff? That is the thing that occurs to me.

MR. QUINN: It is for the jury to say whether that is hearsay. If the police officer, long after this, and after the accident happened, noticed it, it is for the jury to say whether she could have noticed the condition irrespective of whether she knew whether or not he had been drinking in his apartment.

* * * *

267 How about No. 8, gentlemen?

MR. QUINN: No. 8 is all right. If it applies to both defendants.

MR. BOYD: I think it should say instead of
268 “return a verdict for the Capital Transit Company”
should say simply “return a verdict for defendant.”

THE COURT: Is there any objection?

MR. CAREY: No, if this was an unavoidable accident—

MR. QUINN: That wouldn't be so. The testimony of plaintiff is they were proceeding down Wisconsin Avenue, Mr. Weber was driving slowly and cautiously, so slowly she could read the signs on the windows and at the theatre, and as they got to a certain point this street car, which she remembered seeing first was a street car coming down south, ahead of them, and they spun around the street, the testimony of Mr. Weber is that the car suddenly skidded and he was not driving fast; something caused it to skid. He did not turn out on the tracks. That was also the testimony of the police officer, that there are holes where the macadam and the concrete join. Any number of things may have contributed to that car skidding, without any fault on his part, and the accident would be unavoidable on his part, and the evidence shows they were so close to the street car they could not avoid hitting him; after he was precipitated out there, it would be unavoidable on his part.

THE COURT: The Court does not think that prayer should be granted. That Prayer 7 should be denied.

MR. BOYD: So we may know our position, we are at liberty to argue if the jury finds this was an unavoidable
269 accident, then they should return a verdict for
defendants?

THE COURT: Surely you can, yes.

MR. KEOUGH: I don't think counsel should be permitted—

MR. QUINN: Just a moment, Mr. Keogh. In this connection, that No. 8, offered by the Capital Transit Company and as amended, offered on behalf of both defendants—may I say offered too on behalf of Mrs. Weber?

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275 MR. QUINN: I misunderstood Your Honor, apparently counsel tells me you said you granted No. 4.

THE COURT: No, Plaintiff's No. 4.

MR. QUINN: All of mine are denied.

THE COURT: Right.

MR. QUINN: May I argue to the jury on the question of assumption of risk, if they believe what these officers said about liquor on him, and she knew about it?

THE COURT: No, sir, you can make a record of that so you can have the benefit in the Court of Appeals.

MR. QUINN: Then I ask Your Honor to permit
276 me to argue to the jury if they find that Mr. Weber had been drinking and this drinking affected his ability to drive the automobile safely, and his condition from the drinking contributed in any way to the causing of this accident, and the plaintiff knew of this condition before she entered the automobile and voluntarily entered the automobile she assumed the risk of any danger upon entering the automobile.

THE COURT: The Court won't permit that argument and Mr. Quinn takes an exception.

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THE COURT (Goldsborough, J.): Ladies and gentlemen, this case involves a suit by the plaintiff against Hazel Weber and the Capital Transit Company; also what is known as a cross-claim by Hazel Weber against the Capital Transit Company. If you find a verdict for the defendants, it is not necessary to consider the cross-claim.

If you find a verdict against Hazel Weber, and not against the Capital Transit Company, it is not necessary to consider the cross-claim. But if you find for the plaintiff against the Capital Transit Company and not against Hazel Weber, then on the cross-claim you should bring in a verdict of \$1,000 in favor of Hazel Weber against the Capital Transit Company.

Of course if you should find for plaintiff against
280 both defendants you still do not have to consider the cross-claim.

When you come in from the jury room, the first thing you will be asked is whether you find for plaintiff against the defendants. As I said before, if you find for defendants, then there is no cross-claim concerned. If you find against both defendants it is not necessary to consider the cross-claim. If you find for plaintiff and against Hazel Weber and not against the Capital Transit Company, it is only necessary to consider the cross-claim in the case.

If for any reason that condition should not be clear when you get in the jury room you can come out and ask for further instructions.

The Court, at the instance of counsel, granted certain instructions as being the law in the case.

The jury is instructed that negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do under the same or similar circumstances.

It is the failure to use ordinary care in the management of one's property or person, and if by this test the jury finds that either or both of the defendants were negligent and that such negligence was the proximate cause of the injuries complained of, then their verdict must be for the plaintiff; against such defendant or defendants.

You are instructed that if you are reminded of
 281 the fact that the vehicle in which the plaintiff Gertrude M. Eaton was riding at the time of the accident in question was then being operated by the agent of the defendant, Hazel Weber, and you are instructed that the drivers negligence, if any, may not be imputed to the plaintiff and that therefore, you shall find that there was no contributory negligence on the part of the plaintiff.

That is, you can't find in this case the plaintiff was guilty of negligence.

You are instructed that if you find from the evidence that the plaintiff is entitled to recover in this action, then you should award her such damages as will fairly and reasonably compensate her for such injuries and damages as you shall find she has suffered. In estimating such injuries and damages, you are to take into consideration the sufferings of the plaintiff, including bodily pain, in consequence of the injuries, and also the mental pain and suffering naturally incident to such bodily suffering; the character and extent of her physical disabilities as the result of her injuries, whether the injuries are permanent or otherwise; the inconvenience to which she has been put and to which she will likely be put during the remainder of her life as the result of her injuries; and the pecuniary loss which the evidence shows as the result of the accident the plaintiff sustained and which she is reasonably likely
 to sustain hereafter, including all monies expended
 282 for medical and nursing care and treatment and other expenditures in connection with the treatment of or suffered as a result of the injuries received.

The jury is instructed that the burden of proof is upon the claimant in this case to establish her claims by a preponderance of the evidence, and unless you find that she has carried this burden, it is your duty to return a verdict for the defendant, Capital Transit Company.

In other words, you must find how the accident occurred by evidence and not by speculation or guess.

At the place of this collision, street cars, while being operated with due care had a preferential right of way over the tracks on which they were traveling, which the operator of the automobile was required by law to observe, and if you find that the automobile driver failed to accord the street cars this preferential right of way and that such failure on his part was the sole cause of the accident, then it is your duty to return a verdict on behalf of the defendant, Capital Transit Company.

If you find that neither operator of the two street cars, that the operators of the two street cars were not guilty of any negligence, it is your duty to return a verdict for the Capital Transit Company.

If you find that the sole negligence was on the part of Mr. Weber, the operator of the automobile, then
283 it is your duty to return a verdict for the Capital Transit Company.

If you find that Mr. Weber, the driver of the automobile, was guilty of any negligence which—that should be directly contributed to the accident, then Mrs. Weber cannot recover in her cross-claim against the Capital Transit Company.

If you find that any witness or party has testified falsely with respect to any material matter about which he or she could not reasonably have been mistaken, then you are at liberty to reject all or any portion of the testimony of such witness or party.

MR. HORNING: You Honor didn't read Prayer No. 4 of the Capital Transit Company.

THE COURT: I may have overlooked that.

The jury is instructed that the operators of the street cars while operating their cars at lawful speed, having the preferential right of way, had the right to assume, until the circumstances would have suggested otherwise to a reasonably prudent man, that the driver of the automobile would honor this right of way, and if you find that as soon as it should have become apparent to these operators that the driver of the automobile was not going to yield the right of way, the street cars were then so close that they could not by the use of ordinary care be brought to a stop in time to avoid the accident, then it is your duty to return a verdict for the defendant Capital Transit Company.

* * * *

284 (The following proceedings took place at the bench between Court and counsel outside the hearing of the jury):

THE COURT: This is merely a formality, in the first prayer you used the plural speaking of the plaintiff. I just changed it there to "she" and so on.

Now, I want to ask you if you have any further suggestions.

MR. QUINN: None.

MR. BOYD: We have none.

THE COURT: I think the case has been covered myself.

MR. BOYD: Your Honor, I am sorry I didn't think of this sooner, when I went to the Judge on the cross-claim this week—

THE COURT: Yes, I agree with you.

MR. BOYD: The theory is very simple, that the cross-claim is right out of the case. There is only one contention on which there could be a recovery on the cross-claim; that is in the event they return a verdict against the transit company and not against Weber.

Now, I am willing to state to the Court if that verdict is returned I will consent to the entry of a judgment of \$1,000 in favor of Weber against the Capital Transit Company, which would permit your Honor to say that had been worked out.

THE COURT: Suppose I say to disregard the cross-claim?

MR. QUINN: I think Your Honor covered it very clearly. I don't see any chance of confusion. The
285 only time they could consider the cross-claim if they found against the Capital Transit Company alone.

We can't consider that. It would be tied up in court for years.

THE COURT: All right, gentlemen.

